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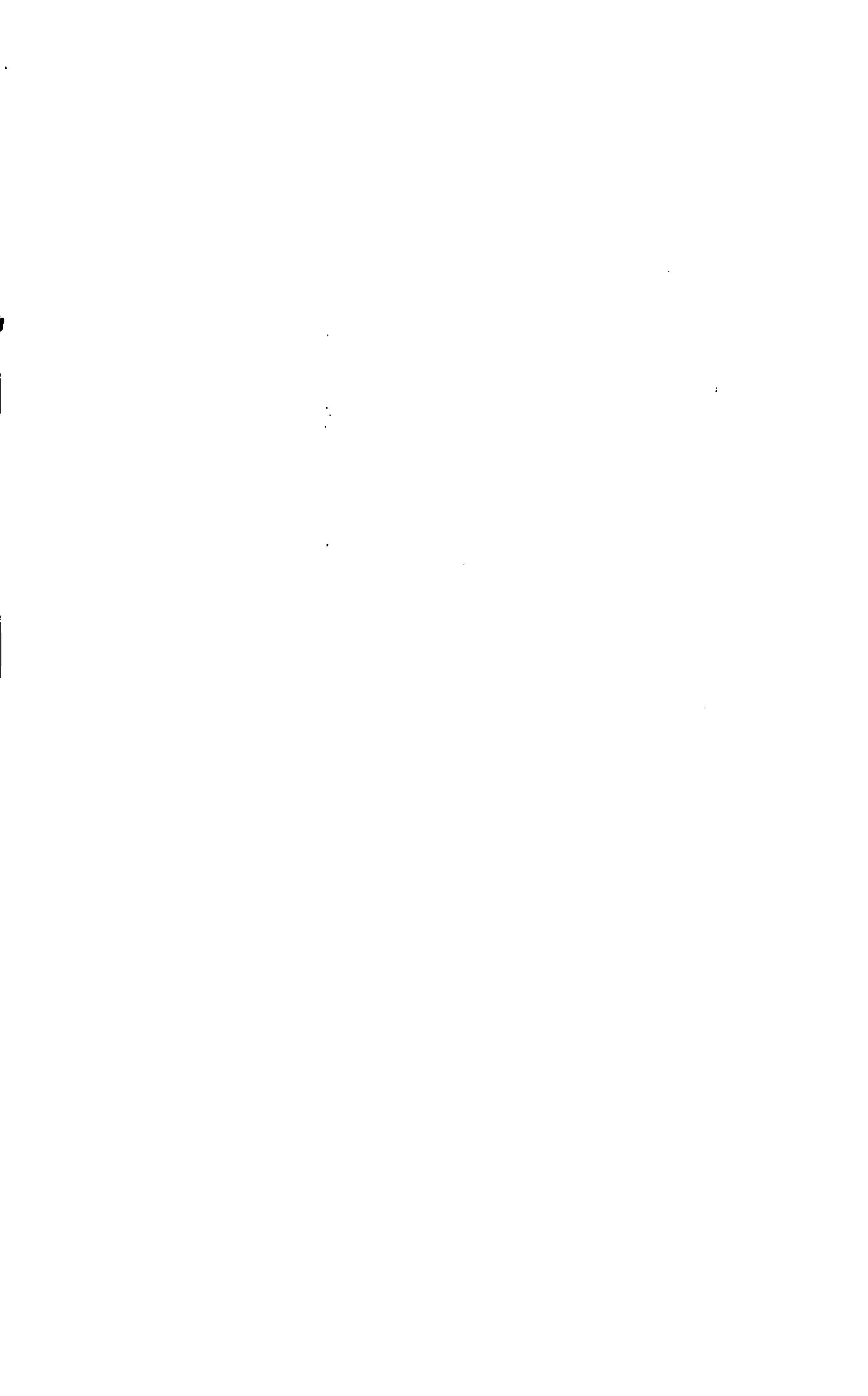
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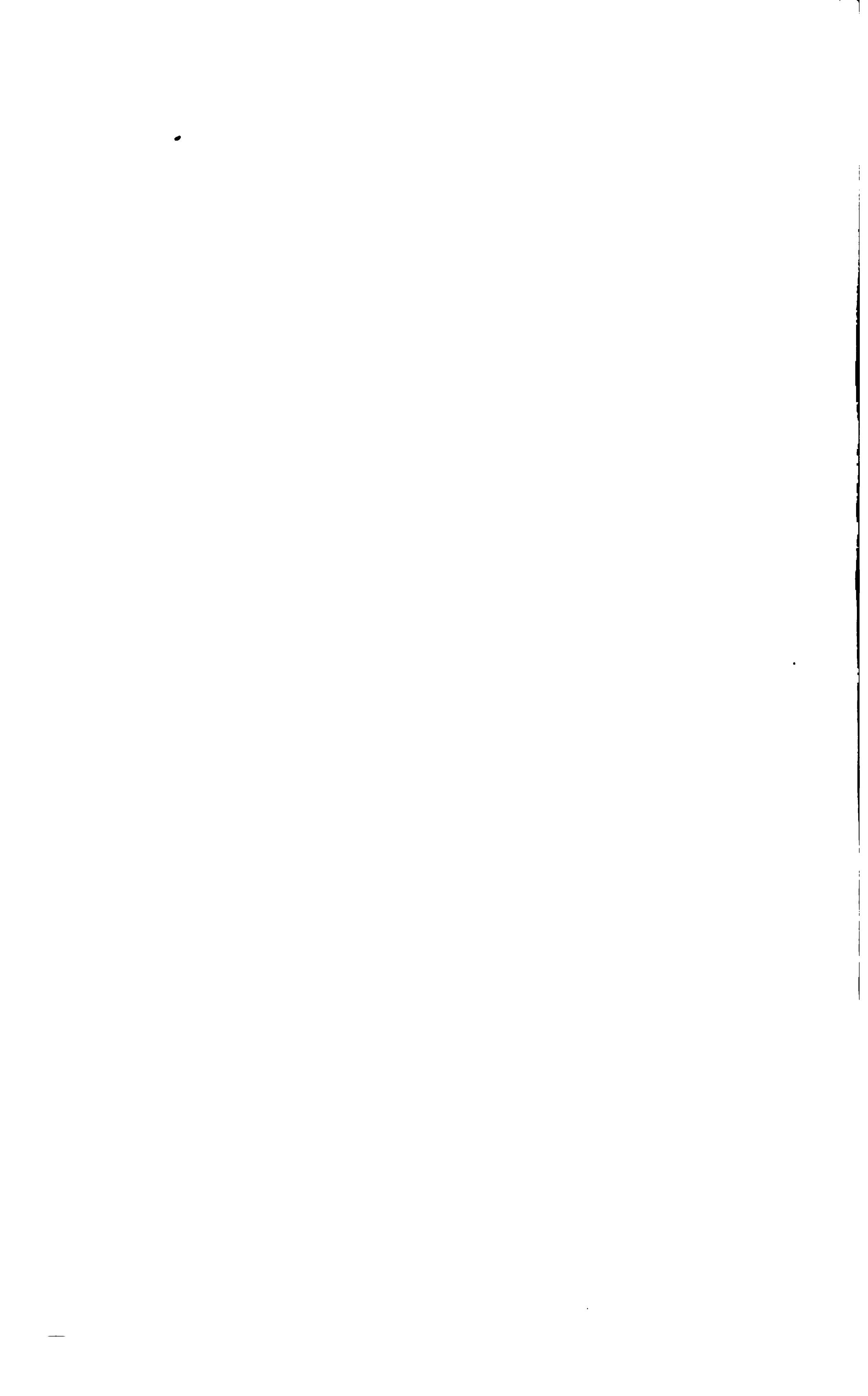
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

By JAMES B. BLACK,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
DURING THE TIME OF THESE REPORTS.

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JOHN PETTIT, LL. D.
ALEXANDER C. DOWNEY, LL. D.
JAMES L. WORDEN, LL. D.

*Chief Justice at the May Term, 1872.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1872, IN THE FIFTY-SIXTH YEAR
OF THE STATE.

JENKS *v.* THE STATE.

CRIMINAL LAW.—*Trial.*—*Construction of Statute.*—The word “trial,” as used in section 120, 2 G. & H. 420, is not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in a criminal action from the submission of the cause to the jury to the rendition of judgment.

SAME.—In a criminal action, until a motion for a new trial which has been filed is disposed of, the cause is pending in court, and the parties are presumed to be in court.

SAME.—*Bill of Exceptions.*—In the progress of the trial of a criminal action, a bill of exceptions was prepared and presented to the judge, but was not signed or filed with the clerk during that term, but was signed and filed at the second term thereafter, that being the term at which a motion for a new trial in the cause was determined and judgment rendered.

Held, that the signing and filing were within the time prescribed by the statute.

SAME.—A bill of exceptions in a criminal cause cannot be signed and filed after the term at which judgment is rendered.

SAME.—*Postponement of Trial.*—While a cause was being tried on an indictment for murder, and before the defence had closed, a material and competent witness for the defendant, who had been served with process, became seriously ill and unable to appear and testify; whereupon it was agreed, in open court, between the defendant and his counsel and those engaged in the prosecution, that if the witness should be able to appear at any time before the cause was submitted to the jury, he should be allowed to testify; and if

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he should not be able to appear, then the defendant should have the same right to move for a postponement of the trial that he would have if the motion had been made before the close of the defence, and with like effect. With this agreement, the parties proceeded until the rebutting evidence on the part of the State was closed, whereupon, the defendant's witness not yet being able to be present, a motion was made to postpone the trial for eight days, which motion was supported by affidavits showing the materiality of the facts expected to be proved by the witness, and that during the trial he had been suddenly taken ill and could not, without great danger, leave his house, etc.

Held, that it was error to refuse to postpone the trial.

APPEAL from the La Grange Circuit Court.

BUISKIRK, C. J.—The appellant was indicted, tried, convicted of murder in the first degree, and sentenced to the State's prison for and during his life. Motions for a new trial and in arrest of judgment were made and overruled, and the appellant excepted, and the rulings on these motions are assigned for error.

Various reasons were assigned for a new trial, but the one first to be considered is the refusal of the court to continue the case upon the application of the prisoner. It will be necessary to a proper understanding of the questions arising upon the action of the court in overruling the application for a continuance, to set out the bill of exceptions, which contains the affidavits made in support of such motion, and the action of the court thereon, and which is as follows: "Be it remembered that in this cause there was no bill of exceptions signed by the judge or filed by either party until this term of the court; that the following bill of exceptions was then filed:

'The State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, December Special Term, 1870.

'Be it remembered that on the 10th judicial day of this term of the court, and before the defendant's counsel had closed his defence, they stated to the court that George Rockwell was a material and important witness for the defence, by whom they expected to prove the facts set forth in the affidavit of Mary Jenks, hereinafter set forth, and that since the opening of the defence the said Rockwell had been

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taken seriously ill, and that they would ask for the delay of the trial until the said Rockwell should so far recover from his illness as to enable him to appear in court and testify as a witness for and on behalf of the defendant, unless the prosecution would agree that if the said Rockwell should appear at any time before the cause should be submitted to the jury, he should be allowed to testify in said cause, and unless the State would further agree that in case the said Rockwell should not be able to appear in court as a witness, as aforesaid, before said cause should be ready to be submitted to the jury, then the defendant should have the same right to move the court for a postponement of the trial that he would have had if the motion had been made before the close of said defence, and with like effect; which proposal of the defendant's counsel was accepted and agreed to by the counsel for the State in open court; and thereupon the defence closed, except as to the testimony of said Rockwell; and thereupon the State introduced her rebutting evidence; and when the rebutting evidence on the part of the State was closed, to wit, on the 13th day of said term of said court the defendant moved the court for a postponement of the trial of said cause for the period of eight days, and in support of said motion submitted to the court a subpoena for the said George Rockwell, and the return thereon, which subpoena and return are in these words:

"The State of Indiana, La Grange county. The State of Indiana to the sheriff of said county greeting.

" You are hereby commanded to summon Cornelia Bigelow, Rufus Patch, Stephen M. Conley, Nat Cone, Lyman M. Abbott, and George Rockwell to appear before the judge of the La Grange Circuit Court on the first day of a special term, to be held at the court-house in La Grange, on the 12th day of December, 1870, to testify in an action wherein the State of Indiana is plaintiff and Stephen Jenks is defendant, on behalf of the defendant, and return this summons.

" Witness the clerk of said court this 24th day of November, 1870.

JOHN H. RERICK, Clerk L. C.

Jenks v. The State.

"Served this instant on the within named Cornelia Bigelow, Rufus Patch, Lewis M. Abbott, and George F. Rockwell, by reading same to them, and on the within named Stephen M. Conley by leaving a true copy of same at his last usual place of residence. The within named Nat Cone not found.

"JAMES M. MARKS, Sheriff.

"December 10th, 1870."

'And the affidavit of Mary Jenks in these words:

"State of Indiana v. Stephen Jenks. In the La Grange Circuit Court, November Sp. Term, 1870.

"Personally came into open court Mary Jenks, who, upon her oath, says that she is the sister of the defendant; that George Rockwell is, as she believes, a material witness for the defence; that he is a physician, who has resided in Ontario, in said county of La Grange, where the deceased Mallow and the defendant resided, and where the shooting took place; that he was well and intimately acquainted with the defendant at the time of said shooting, and had been so acquainted with him for some three years prior thereto; that he had been, for more than two years prior to said shooting, the physician of the defendant, and as such had prescribed from time to time for the defendant during said period; that said Rockwell has told, on two occasions, once in August, 1870, and again about the 19th inst. (November) that the defendant had been, in the opinion of said Rockwell, ever since he, the said Rockwell, had lived in Ontario, insane; that she believes said fact can be proven by the said Rockwell. She further says that she believes that it can be proven by said Rockwell that the defendant, for a period of more than two years, was suffering at times from severe headache; that he frequently complained of a pain in his forehead; that he was, during said period, moody and depressed; that he believed, without cause, that his neighbors and others, such men as John B. Howe, Samuel P. Williams, and others, who did not know him, were combined against him for the purpose of injuring him; that the belief as to said conspiring was false, and not founded upon any process of reasoning; that he

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also believed that he was enabled by superhuman power to read men's thoughts; that he, defendant, stated to Rockwell, on the day of the shooting, and within twenty-five minutes of the time at which Mallow was killed, that he shot him because he was compelled to shoot him; that God had required him to do it. Said affiant further says that she believes said facts to be true; that the said Rockwell has, as she believes, been duly subpoenaed to attend this court as a witness; that he is not now in attendance, but is, and has been, ever since the defence began, confined to his house by sickness; that he cannot now leave his house without danger. She further states that she is informed and believes that the said Rockwell will be able in the course of five or six days to be present in court, and testify. She further says that she has personally seen and talked with said witness, and knows that he is not absent through the advice, consent, or connivance of the defendant, nor through the advice and consent of others with the defendant's knowledge, or by his consent. She further says that she believes the defendant to be now insane, and therefore she makes this affidavit on his behalf.

MARY JENKS.

"Subscribed and sworn to in open court, this 26th day of December, 1870. JNO. H. RERICK, Clerk."

'And the affidavit of Avery A. Shelden, in these words:

"State of Indiana v. Stephen Jenks. In the La Grange Circuit Court, Special December Term, 1870.

"Personally appeared in open court Avery A. Shelden, and upon his oath says, that George Rockwell, mentioned in the affidavit of Mary Jenks, is, he believes, unable to attend this court; that he went for him to-day with a suitable conveyance; that said Rockwell, being a physician, says that he is willing to attend this court, but is, from sickness, unable to attend court without endangering his life.

"A. SHELDEN.

"Subscribed and sworn to before me in open court, this 26th day of December, 1870. JOHN H. RERICK, Clerk."

'Also, the affidavit of J. D. Farrall, in these words:

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"State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, November Special Term, 1870.

"Personally appeared in open court Joseph D. Farrall, and upon oath says, that he and John Morris are the attorneys of the defendant; that at the time the trial of this cause was commenced, he was informed and believed that George Rockwell, the person mentioned in the affidavit of Mary Jenks, was then in usual health; that he knew he was a material witness for the defendant, and had him duly subpoenaed; that since the trial began, as he is informed and believes, the said Rockwell was suddenly taken ill, and has been ever since confined to his house; that he cannot, without imminent danger, leave his house or attend this court as a witness; that this affiant, from personal conversation with said Rockwell, believes that the facts as set forth in the affidavit of said Mary Jenks can be proven by said Rockwell.

"J. D. FARRALL.

"Subscribed and sworn to in open court, this 26th day of December, 1870. JNO. H. RERICK, Clerk."

'And the affidavit of John Morris, in these words:

"State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, November Special Term, 1870.

"Personally appeared in open court John Morris, one of the attorneys for said defendant, who upon his oath says, that at the commencement of this trial he was informed that George Rockwell, the person mentioned in the affidavit of Mary Jenks, would be present during the trial of said cause as a witness for and on behalf of the defendant; that he understood he had been duly subpoenaed as a witness, and that, as he was then informed, he was well and able to attend; that had he known that said Rockwell would not be able to attend as a witness, he would not have consented to go into the trial of said cause; that from the information which affiant has obtained from others, he believes that the facts as set forth in the affidavit of Mary Jenks can be proven by said Rockwell; that they are material, and that some of

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the facts cannot be proven by any other witness as fully as
by said Rockwell.

JOHN MORRIS.

"Sworn to in open court, November 26th, 1870.

"JOHN H. RERICK, Clerk."

'Which motion the court overruled, and refuses to delay the trial of said cause; to which decision of the court the defendant, by counsel, at the time excepts, and prays that this his bill of exceptions may be signed and sealed, and made a part of the record; which is done accordingly.

[SEAL.]

HIRAM S. TOUSLEY.

December 13th, 1870.'

It is earnestly maintained by the counsel for appellee that the above bill of exceptions does not constitute a part of the record in this cause; and that, consequently, no question arising upon the refusal of the court to continue the cause is presented for our decision. The facts are these:

The indictment was found and returned at the September term, 1870, of the La Grange Circuit Court. There not being time to try the cause at that time, the court was adjourned until the 12th day of December, 1870. At that time the trial was commenced. On the 14th day of December, 1870, and before the evidence on the part of the defendant was closed, the counsel for the appellant stated in open court that George Rockwell was a material and important witness for the defendant; that he had been duly and legally summoned to attend and testify on behalf of the defendant, and had consented to do so; that he was in good health at the time when the trial commenced, but had been suddenly taken sick and was then unable to attend court by reason of such sickness; that unless the State would consent that such witness might be examined at any time before the cause was submitted to the jury, if he was able to attend court, the defendant would then make an application for a postponement of the trial; and that it was then agreed in open court that the said absent witness might be examined at any time before the cause was finally submitted to the jury; and if the witness was unable to attend, that the defendant might,

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at any time before the cause was submitted to the jury, make an application for the postponement of the trial, with the same force and effect as if made at that time. On the 27th day of December, 1870, and before the cause was submitted to the jury, the appellant moved the court to postpone the trial of the said cause for eight days; and in support of such motion, he filed the affidavits set out in the foregoing bill of exceptions. The motion was overruled and the appellant excepted, and thereupon he presented to the judge of said court the above bill of exceptions; but the same was not signed by the judge or filed with the clerk of said court during the said term of court. The motion for a new trial was not decided at said term, but was taken under advisement until the March term, 1871.

At the March term, 1871, the said motion was taken under further advisement until the September term, 1871, at which time the motion was overruled, to which ruling the appellant excepted. During the September term, 1871, the bill of exceptions embodying the evidence and the one above set out were signed by the judge and duly filed in the clerk's office of said court.

The position assumed by the appellee is, that the bill of exceptions should have been signed by the judge and filed with the clerk during the term at which the trial was had; and in support of this position, he refers us to section 120 of the criminal code (2 G. & H. 420), which reads as follows:

"Sec. 120. All bills of exception in a criminal prosecution must be made out and presented to the judge at the time of the trial, or within such time thereafter during the term, as the court may allow, signed by the judge and filed by the clerk. The exception must be taken at the time of the decision."

We will state the position of the appellant, in the language of his counsel, as stated in his brief, and which is as follows:

"It may be questionable whether the language of the section quoted requires the bill of exceptions to be signed at the trial; it may, consistently with the language, be plausi-

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bly argued, at least, that it is only necessary to make it out and present it at the trial. Be this as it may, I think, upon examination, that it is quite clear, from the record, that the bill of exceptions was, within the meaning of this section, signed at the trial.

"What does the phrase, 'at the time of the trial,' mean? The preposition 'at' primarily signifies near to, about, co-existent with, etc. It is very commonly used, however, as in the above section, in the sense of 'during.' The bill of exceptions must be made out during the time of the trial. The word 'trial' has in the law and in legal language, a general and restricted meaning. In its general sense, it means the investigation and decision of a matter in issue between parties before a competent tribunal. Burrill Law Dict. In its restricted sense, it means the investigation of the facts only. That it is used in the former and general sense in the statute, admits, I think, of no possible doubt. The practice throughout the State, ever since the adoption of the code, proves this. If it shall be taken in its restricted sense, then a bill of exceptions could not be signed after the cause was given to the jury, for the obvious reason that it would not be signed 'at the time of the trial.'

"Even a bill of exceptions, signed by the judge, and filed with the clerk, after the return of the verdict, though at the same term, would be void, and no part of the record. Now, as a matter of practice, we know that almost every bill of exceptions is made out and signed after the return of the verdict. I would hazard but little in saying that there is not a record on file in this court that shows that the bill of exceptions was signed before the verdict was returned, or, if the word trial is to be used in its limited sense, at the trial.

"If the bill of exceptions may be signed after the return of the verdict, at the same term, before judgment, it can be signed at any subsequent term, before judgment is rendered, for the clear and obvious reason that until judgment the matter in issue is not decided. That the above is the proper construction of the statute, that which has been acted upon

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in the lower courts, seems very clear. There is no decision that I have seen opposed to this view.

"The language of this court, in the case of *Noble v. Thompson*, 24 Ind. 346, suggests the reasonableness of the above view. The court say: 'Whilst the cause is pending, and until the expiration of the time given, the adversary party is in court, and must guard his interests at his peril. It seems reasonable, as tending to promote justice, that, during that period, the court might, for good cause, in term, enlarge the time first limited for filing a bill of exceptions.'

"Here the cause was pending, and the parties in court, when the bill of exceptions was signed, and agreeing to its correctness. It was signed in term, and the motion is, I think, properly in the record."'

We have, upon very mature and thoughtful consideration, come to the conclusion that the bill of exceptions is in the record. Until the motion for the new trial was disposed of, the cause was pending in court, and the parties were presumed to be in court, and in this case they were, in point of fact, present in court. The proceedings were *in fieri* until judgment was rendered. We are of the opinion that the word trial, as used in the above section, was not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in the cause from the submission of the cause to the jury to the rendition of judgment. If we were to hold otherwise, then we would be compelled to hold that the bill of exceptions embodying the evidence did not constitute a part of the record; for if the word trial only applies to the investigation of the facts, then the bill of exceptions must have been signed by the judge, and filed with the clerk, at the September term, 1870, when the evidence was heard and the verdict was rendered. There are many decisions of this court holding that the bill of exceptions in a criminal prosecution must be signed and filed during the term at which the trial was had, and that bills of exceptions filed after such term constituted no part of the record, but it will be found, upon examination of such decisions,

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that in all such cases judgment had been rendered upon the verdict at the term when the investigation of the facts had taken place. We entertain no doubt that a bill of exceptions cannot be signed and filed after the term at which judgment was rendered. We do not think that the legislature intended that a defendant in a criminal prosecution should be required to prepare his bill of exceptions, embodying the evidence, and have it signed by the judge, and filed with the clerk, before his motion for a new trial was disposed of. It cannot well be done until the motions for a new trial and in arrest of judgment have been disposed of, for the bill of exceptions should show the ruling of the court on such motions and the exceptions to such rulings.

We think the section under examination should receive a liberal and beneficial construction, and not a strict, technical, and restricted one. In civil actions, where nothing but money and property are involved, the parties can have time beyond the term to prepare and have signed a bill of exceptions, but in criminal prosecutions, where liberty and life are involved, the bill must be signed and filed with the clerk during the term at which judgment is rendered. It frequently happens that there is no time to prepare a bill of exceptions, embodying the evidence, after the close of the trial, and before the final adjournment of court, which may result in an absolute denial of justice.

In the case under consideration, the appellant excepted to the ruling of the court, refusing to postpone the trial, at the time the decision was made, and presented the bill of exceptions to the judge at the term when such ruling was made. In such case, he could compel the judge, after the term, to sign the bill of exceptions. *Stewart v. The State*, 24 Ind. 142.

We are next required to determine whether the court erred in refusing to grant a postponement of the trial on account of the absence of Dr. Rockwell, who was prevented from attending and testifying by reason of sickness. There was no controversy, upon the trial, that the appellant had taken the life of George Mallow, for he shot him in open day,

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in full view of the village of Ontario, and in the presence of several persons. Immediately after the shooting, Jenks hurriedly walked to the store of the deceased and informed the clerk that he had shot Mallow, and that he had better go and care for him. He then avowed, and has ever since asserted, that he acted in obedience to the directions of Heaven. The defence was that the appellant was insane. Nearly all the evidence introduced on the trial related to the question of the insanity of the appellant.

Was the evidence of Dr. Rockwell material and important to the appellant, and did the court err in refusing to postpone the trial, to enable him to put in evidence the testimony of Dr. Rockwell? The substance of Dr. Rockwell's testimony would have been, as appears from his affidavit in the bill of exceptions, that he was a graduate of Bellevue Hospital; that he came to Ontario some three years before the homicide; soon became acquainted with Jenks, for whom, from that time until the killing of Mallow, he occasionally prescribed; that Jenks complained of headache, sleeplessness, and uneasy sensations in the head; that he was very intimate with Jenks, talked with him as often as twice a week, and that his complaints were very frequent; that Jenks told him he was not secure in Ontario; that Dayton was opposed to him, and had poisoned his, Jenks', wife; Rockwell asked Jenks if Dayton had neglected his wife; he said, "No," that Dayton had attended her well, but had given her poison to kill her; that that was one way of getting rid of the Jenks family. The doctor swears that he could not persuade Jenks out of this delusion; that Jenks was at his store very often; that he never conversed with him but that he alluded to a combination of persons to crush him out; that he dwelt upon the conspiracy morbidly, and sincerely believed in its existence; that Jenks claimed the power of looking into men's minds, and thus knowing what they were thinking; that when they met together he knew they were talking about him, and that he could not be persuaded out of the notion, but assumed it as an existing fact; that he included in the conspiracy

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Howe, Williams, Patch, Dayton, Mallow, and others. He further swears that Jenks was a sober and industrious man, and in his opinion insane, and that he had often so remarked to others. Rockwell further states, that immediately after the shooting of Mallow, Jenks came to his store and said: "Come here quick, there is trouble;" Rockwell gave no attention until he heard Jenks say, "It is a fact—I have shot Mallow;" when asked how he had shot Mallow, he pulled out his pistol and said, "This is what I done it with," or words to that effect; he further said, "Here I am, I give myself up; I want you to arrest me." When asked why he killed Mallow, he answered, "There is a set of men in this town that are trying to crush me, and it was decreed that I should leave my mark; I believe in God; it was ordained that I should leave my mark, and I have done it."

There can be no question that the evidence of Dr. Rockwell was very material and important. He had known the appellant intimately, and had prescribed for him. His testimony would not have been that of an expert merely, for he would have testified to facts within his own knowledge, besides giving his opinion upon the testimony of others as a medical expert. This is not an application for a new trial on the ground of newly-discovered evidence, and consequently the doctrine of cumulative evidence does not apply. The appellant knew of the existence of the evidence, but was deprived of it by the act of God. The appellant had, by the process of the court, and the assurance of the witness, secured the attendance of the witness so far as human instrumentalities could secure, and the witness would have been present and testified, but for an event over which neither he nor the court had control.

If it shall be said that, when the cause was called for trial, the appellant should have had his witnesses called, and if all were not present in court he should have refused to proceed with the trial, we answer that it is shown by the record that even such diligence would not have availed him. The wit-

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ness, had he been in court on the first day of the trial, would have gone home at night and visited his patients just as he did, and the result would have been the same.

If the appellant had consented that Dr. Rockwell might have been absent from court, and he had voluntarily refused to attend court, a different rule would obtain. It has, however, been decided that even where the party is not entirely free from fault, the court, when great wrong and injury would otherwise be done, will, for the sake of promoting justice, grant a new trial. *Rigney v. Hutchins*, 9 N. H. 257; *Turner's Adm'r v. Booker*, 2 Dana, 334; *Peebler v. Ralls*, 1 Litt. 24; *Honore v. Murray*, 3 Dana, 31.

There was then no such negligence on the part of the appellant as should induce a court to refuse him a new trial, if otherwise entitled to it.

In the case of *Ainsworth v. Sessions*, 1 Root, 175, the principal witness was, through surprise or some other unaccountable cause, so disconcerted and confused that he could not be understood by court or jury. After the trial, he became composed and clear in his mind and memory. A new trial was prayed for on this ground, and granted by the court. The court say: "Where a party is deprived of his most material evidence by some unaccountable cause, as by being panic struck, or by a paralytic shock, or other affection which for that time, has deranged the recollection of the witness so that the party loses the benefit of his testimony; reason and justice require that the party should be relieved against such a misfortune, by a new trial, as much as when he is deprived of his witness by sickness or absence."

In an early anonymous case reported in 11 Mod. 2, the court say that when an unforeseen accident happens, or some sudden impediment, as sickness, etc., to a witness, and a trial is had, and a verdict is given for the plaintiff, which might have been given for the defendant, had the witness been produced, the court will grant a new trial.

In *Shillito v. Theed*, 6 Bing. 753, the plaintiff suffered a

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nonsuit in consequence of the absence of one of his witnesses that had been duly subpoenaed, and then moved for a new trial. The motion was opposed, but the court granted a new trial. If Rockwell had been well, but detained by some accident, it would have entitled Jenks, according to the ruling in this case, to a new trial. Would not the sickness of Rockwell, for which neither he nor Jenks was responsible, detain him from the trial as absolutely and certainly as any accident could have detained him? If the latter would authorize a new trial, the former must.

In the case of *Ruggles v. Hall*, 14 Johns. 112, a witness for the defendant had been regularly subpoenaed, and attended at the circuit, but shortly before the case was called for trial, absented himself without the knowledge of the defendant or his attorney, and his absence was not discovered until after the jury was sworn, by which means a verdict was obtained against the defendant. In this case it was held that there was no negligence on the part of the defendant, notwithstanding the fact that, if before swearing the jury, he had had his witness called, he might and would thereby have learned that the witness was absent, and might have moved for a postponement. Such extraordinary caution is not required. All these cases are, we think, in point, though none of them is as strong as the case now presented to the court. *Warren v. Fuzz*, 6 Mod. 24; *South's Heirs v. Thomas' Heirs*, 7 T. B. Mon. 59; *Watterson v. Watterson*, 1 Head, 1; 1 Iowa, 515; 6 Ind. 407; 1 Blackf. 395.

In the case in 1 Iowa, Judge WRIGHT, after reviewing the whole case, says: "Viewing the case in its most equitable circumstances, we cannot believe that the prisoner has had that full, fair, and impartial trial, which is secured to him by law; and without which no man should suffer its penalty. There may have been negligence on his part, but we think none such as should close his mouth against complaints, or deprive him of the right of being again heard before a jury. The authorities for ordering new trials, even in appellate

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courts, on such general view of all the equitable circumstances, are numerous and well sustained."

The cases of *Gibson v. The State*, 9 Ind. 264, and of *Keeley v. The State*, 14 Ind. 36, are very much in point, and strongly tend to show that the appellant was entitled to a new trial.

See, also, the following cases: *Fuller v. The State*, 1 Blackf. 63; *Driskill v. The State*, 7 Ind. 338; *Dutton v. The State*, 5 Ind. 533; *Spence v. The State*, 8 Blackf. 281; *Griffith v. The State*, 12 Ind. 548; *Lofton v. The State*, 14 Ind. 1.

The inconvenience of postponing the trial is pressed upon our attention by the learned counsel for the State; but such considerations should have no weight where the rights and liberty of a citizen are involved.

We are very clearly of the opinion that the court erred in refusing to postpone the trial, to enable the appellant to obtain the testimony of Dr. Rockwell.

The judgment is reversed, and the cause is remanded for a new trial; the clerk will notify the warden of the northern prison to return the prisoner to the jail of La Grange county.

J. D. Farrall, J. Morris, and W. H. Withers, for appellant.

B. W. Hanna, Attorney General, and *A. Ellison*, for the State.

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BARLOW *v.* DEIBERT ET AL.

PROMISSORY NOTE AND MORTGAGE.—*Assignment and Additional Mortgage.*—

Subrogation.—B. executed to H. certain promissory notes and a mortgage to secure their payment; H. afterward purchased lands of T., and in part payment transferred the notes and mortgage of B., and with his wife executed a mortgage on the land purchased to secure the payment of these notes, and stipulated to pay them; T. transferred the notes and mortgage to E., who foreclosed the mortgage executed by B., and took personal judgment against him on the notes; W. became bail for the stay of execution on the judgment, and was compelled to pay the same, and received a transfer from E. of any interest he held in the mortgage executed by H. and wife. Suit by W. ask-

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ing to be subrogated to the rights of E. in this mortgage, B. being insolvent. Held, that there was no equity in the case made, and a demurrer to the complaint setting up these facts was properly sustained.

APPEAL from the Bartholomew Circuit Court.

WORDEN, J.—Action by the appellant against the appellees. Demurrer sustained to the complaint, and judgment for defendants. Plaintiff appeals.

The complaint was in two paragraphs, alleging, in slightly different modes, the following facts:

First. That Cornelius and William Barlow executed to John C. Hager certain promissory notes and a mortgage on property therein described, to secure the payment thereof.

Second. That Hager afterward purchased certain lands, described, of Alfred T. Bone, and, in part payment therefor, transferred to him the above mentioned notes and mortgage, and in connection with his wife, Eleanor, (now Eleanor Deibert) executed to said Alfred T. Bone a mortgage on the property thus purchased, to secure the payment of the notes thus transferred, and stipulating to pay the same.

Third. That said Alfred T. Bone transferred the notes and mortgages to William E. Bone, who foreclosed the mortgage executed by the Barlows, and took personal judgment against them on the notes in the proper court.

Fourth. That the appellant became bail for the stay of execution on the judgment above mentioned, and as such he has been compelled to pay over four thousand dollars of a deficit, after exhausting the mortgaged premises.

Fifth. That Cornelius and William Barlow are insolvent, and that William E. Bone has transferred to the plaintiff whatever interest he had in the mortgage executed by Hager and wife to Alfred T. Bone. Other averments are made connecting the defendants to the suit with the case.

Prayer, that the plaintiff may be subrogated to the rights of William E. Bone, and that the mortgage executed by Hager and wife be foreclosed in his favor, and for general relief.

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There is no equity in the case made, and the demurrer was properly sustained to the complaint.

The debt for which the appellant became surety was the debt of Cornelius and William Barlow, and one which they, as between themselves and Hager, ought to pay. It may be conceded that Bone might, in the first instance, have foreclosed his mortgage against Hager without first resorting to legal measures to collect the debt of the makers of the notes, or foreclosing their mortgage. *Zekind v. Newkirk*, 12 Ind. 544; *Ballenger v. Oswalt*, 26 Ind. 182; *O'Haver v. Shidler*, 26 Ind. 278. The stipulation in the mortgage executed by Hager to pay the notes thus assigned by him would, doubtless, subject him to an action for non-payment; but this did not release the makers of the notes from the duty that devolved principally upon them to pay them. Then when the appellant became bail for the stay of execution, he became as much bound for the payment of the debt as were his principals, the only difference being that the property of the principals was to be first exhausted. A recognizance of bail for the stay of execution has the effect of a judgment confessed; and an execution issues jointly against the principal and bail, but is to be first levied of the property of the principal. 2 G. & H. 235-6, secs. 427-8.

When the appellant became replevin bail for the payment of the debt, it became his duty, as between himself and Hager, to pay the debt as much as it was that of his principals. He occupies a position no more favorable than if he had been originally a surety upon the notes, and judgment had been rendered thereon against him with his principals, with proper directions to first levy upon the property of the principals. In such case, it will scarcely be contended that there would be any equitable ground to require Hager in any manner to reimburse him. A party becoming bail for the stay of execution is considered as having adopted and become a party to the original contract, as the surety of the debtor. *Hutchins v. Hanna*, 8 Ind. 533.

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The equitable doctrine, that a surety is entitled to be subrogated to the securities held by the creditor, has no application to cases like the present. That doctrine supposes that the securities thus to be resorted to for the benefit of the surety are valid and subsisting securities, and such as can be equitably enforced. Such is not the case in reference to the mortgage executed by Hager to Bone. That mortgage became discharged and liquidated by the payment of the debt which it was intended to secure. It had then performed its office and ceased to be a subsisting security. It might be regarded as kept alive, perhaps, if there were any equities requiring it. *Howe v. Woodruff*, 12 Ind. 214. But there are no such equities in the case. As it was the duty of the surety as well as his principals to pay the debt, as between themselves or any of them and Hager, we see no ground upon which the latter can be equitably called upon to reimburse the surety.

The judgment below is affirmed, with costs.

S. Stansifer, for appellant.

F. T. Hord, for appellees.

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PRACTICE.—Jury.—Evidence.—Where the jury, having retired, returned into court and requested to hear a portion of a deposition, it was improper for the court to ask them if they desired "any of the account books," and to offer to send such books to their room, and to permit them to take such books to their room. The better and prevailing practice is not to send the evidence out with the jury except as they carry it in their memory.

SAME.—Ground for New Trial.—"Error of law in admitting illegal evidence," or "error of law in excluding competent evidence," is not, when thus stated, sufficiently definite as a cause for a new trial.

EVIDENCE.—Partnership.—Entries in the account books of a firm, made prior

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to, and at the date of, any transaction in question, and open to inspection of the partners, are *prima facie* evidence against any member of the partnership.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Lingenfelter purchased of Eden an undivided one-fifth of the lease, buildings, good-will, stock, machinery, and accounts of a planing mill belonging to the firm of Eden, Copeland & Co., at Minneapolis, Minnesota, upon certain representations by him as to the assets and liabilities of the concern, and he brought this action against Eden, alleging that such representations were untrue. The defendant answered, first, a general denial, and, second, payment. Reply to the second paragraph of the answer by a general denial. Trial by jury, verdict for the plaintiff for eleven hundred and forty-four dollars and seventy-one cents. Motion by the defendant for a new trial overruled, and judgment for the plaintiff for the amount of the verdict. The defendant appeals, and assigns as errors the overruling of the motion for a new trial, and also the overruling of a motion made by him in arrest of judgment. We will examine the reasons which were assigned for a new trial.

First. The defendant having objected to the introduction of the books of Eden, Copeland & Co. in evidence, and the court having overruled the objection, and plaintiff's attorneys having asked plaintiff to state the contents of the books from his memorandum, counsel for the defendant remarked, "We have no objection to plaintiff stating his computation from his memoranda, instead of the books, to save time, provided our exception to the evidence is reserved;" whereupon the court remarked, "No, sir, I don't allow any sharp practice of that kind in my court. If you consent, you cannot have an exception." Which language, it is alleged, was irregular, tended to the prejudice of the defendant's cause, and prevented defendant from having a fair trial. We have not examined the record to see whether any bill of exceptions shows that the language imputed to the court was used or not. Conceding that it was used, and

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that it was not warranted by the circumstances, it would not, we think, be a sufficient cause for reversing the judgment. We could not infer from it what is inferred by counsel for appellant, that is, that it prevented the defendant from having a fair trial. The jury could hardly have been so easily influenced.

Second. Irregularity of the court in sending to the jury books of account given in evidence over the defendant's objection, which was contrary to law.

Third. Irregularity in sending to the jury room books of account, which had not been read in evidence, over the objection of the defendant, contrary to law.

Fourth. Irregularity of the court in reading to the jury, after the argument had closed and the jury had been charged and had been sent to their room, the depositions of Jesse Copeland and B. F. Copeland.

The bill of exceptions shows that the jury came into court, after they had been out for some time, and desired to see the deposition of Jesse Copeland, to see if there was any fraud. The court read the deposition of Jesse Copeland to the jury over defendant's objection, and to the reading of which the defendant excepted. The court then inquired of the jury, "Is there anything further in the depositions you want?" Juryman: "No sir." Court: "If you will indicate to me what books you want to examine, I will send them with you." Juryman: "Some of the jury want to hear Frank Copeland's deposition." Court: "There is considerable of it; if you will direct me to any part, I will read it." The court then read the deposition, over the objection of the defendant, and he excepted. The court also read the supplemental deposition of the same witness, to which the defendant objected and excepted. Court: "Now, if you wish to take any of the books, indicate them." Juryman: "We might take the ledger and Eden's small book." The ledger and Eden's small book were then given to the jury, over the objection and exception of the defendant.

It is provided in the civil code, that "after the jury have

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retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their attorneys." 2 G. & H. 203, sec. 331.

Every attorney who has had much practice knows what a critical period it is in the history of a lawsuit, when the jury, after having been out, and being unable to agree, return into court for further instructions as to the law, or information as to the facts of the case. It is then that words are most weighty. In the discharge of its duty then, the court should be more than usually careful.

The jury in this case came into court with no other request, according to the bill of exceptions, than "to see the deposition of Jesse Copeland, to see if there is any fraud." To that extent it was proper for the court to read to them the evidence. But the court did not stop here, but inquired if there was anything further in the depositions which they wanted; and when the juror answered in the negative, the court said, "If you will indicate to me what books you want to examine, I will send them with you." The jury had made no request for the books, but after this inquiry by the court, they concluded to hear another deposition; and after it was read, and the court had said, "Now, if you wish to take any of the books, indicate them," the jury concluded to take "the ledger and Eden's small book."

It seems quite clear that the jury did not go into court for books, and that the idea of taking books to their room was first suggested by the court. It seems to us that this was not proper. Under the statute of 1843, the court could decide what papers the jury should take with them to their room. R.S. 1843, p. 734; *Waltz v. Robertson*, 7 Blackf. 499. But no such provision is found in the present statute. The practice almost uniformly prevailing over the State, and the better practice, too, we think, is not to send the evidence

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out with the jury, except as they carry it in their memory. This may be inferred, probably, from the section of the code of practice which we have quoted, which provides that the jury shall be brought into court if they disagree as to any part of the testimony, etc.

We think, also, that it is at least doubtful whether these books had been given in evidence before the jury retired. The bill of exceptions does not show that they were read to the jury, or that it was agreed that they should be considered in evidence without having been read.

Fifth. Error of law committed by the court in the admission of illegal, incompetent, and irrelevant testimony over objections of defendant.

Sixth. Error of law in excluding competent, legal, and relevant testimony offered by defendant.

We must regard these two reasons for a new trial as too indefinite to present, either to the court below or to this court, any question for decision. How can we know where to look, in a record of one hundred and sixty pages, for this admitted or excluded testimony? or how shall we recognize it when we have found it?

Seventh. Error of law in refusing to give written instructions, asked by defendant, three, four, and six.

We have examined these instructions, and think that they were properly refused.

Eighth. Error of law in giving instructions one, two, three, four, five, six, eight, and nine.

The first six related to the question of fraud, and seem to us to be correct. The eighth informs the jury that if the books which were given in evidence were kept by the firm of Eden, Copeland & Co., for the purpose of their daily accounts with all persons having dealings with them, and were subject to the inspection of the defendant, as a member of the firm, the entries therein pertaining to matters in controversy will be considered, as to all the entries made up to the 21st day of September, 1867, as correct, unless the contrary has been shown by the evidence. We see no objection

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to this. It made the books of the firm *prima facie* evidence against the members as to the matters entered thereon prior to, and at the time of, the transaction in question. Such seems to be the law. *Lindley Partnership*, 1000.

There is no ninth charge in the record.

Other questions were presented on the motion for a new trial, but as they relate to matters which will not probably arise again, we need not consider them.

The motion in arrest of judgment calls in question the sufficiency of the complaint; but, upon examination of it, we think it is sufficient. Other reasons for arresting the judgment were assigned, but they are not causes for arresting the judgment.

The judgment is reversed, with costs; and the cause remanded, with instructions to grant a new trial.

F. T. Dye and A. C. Harris, for appellant.

E. W. Kimball, E. H. Lamme, R. O. Hawkins, F. Hanna, and F. Knefler, for appellee.

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PARTIES.—Adults.—*Presumption of Law.*—The law presumes that all parties to a suit are adults, unless the contrary is made to appear.

NEXT FRIEND.—*Consent.*—Where a complaint filed before a justice of the peace is signed by one as next friend of the plaintiff, it is a sufficient consent in writing under section 11, 2 G. & H. 42.

APPEAL from the Tippecanoe Common Pleas.

PETTIT, J.—This suit was brought before a justice of the peace by the appellee against the appellant, on the following cause of action: "John Rowe in account with George Arnold, debtor for labor done by plaintiff for defendant from March 11th, 1870, until May 20th, 1870, at sixteen dollars per month—thirty-seven dollars and fifty cents. George Arnold by Ezra Huffman, his next friend."

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The transcript of the justice says that the defendant moved to dismiss the cause, for the reason that the suit is in the name of George Arnold by Ezra Huffman, his next friend, and the summons has not the name of Ezra Huffman in it. The motion was overruled. The summons is not in the transcript, and we cannot say that it did not contain the name of the next friend, even if it were necessary that it should, which we do not decide. On appeal to the common pleas, the clerk's entry says, "The defendant moves the court to dismiss the cause herein for want of next friend." The motion was overruled, and exception taken.

The correctness of this ruling is the only question in the case. The record nowhere shows that George Arnold was a minor, and the name of the next friend might have been treated as surplusage, and the cause prosecuted in the name of Arnold; for the law presumes that all parties to suits are adults, unless the contrary is made to appear. *Hanly v. Levin*, 5 Ohio, 228. But the complaint is signed by Huffman as the next friend, and is a sufficient consent in writing under sec. 11, 2 G. & H. 42. We may add that the transcript shows that the next friend also appeared as attorney for the plaintiff, and tried the cause before the justice.

The court committed no error in overruling the motion to dismiss.

The judgment is affirmed, with ten per cent. damages, at the costs of the appellant.

W. D. Lee and P. H. Lee, for appellant.

PEACOCK ET UX. *v. ALBIN.*

WITNESS.—*Statute.—Heirs.*—Under the second proviso in the act of March 11th, 1867, 3 Ind. Stat. 559, "defining who shall be competent witnesses," etc., the word "heirs" includes all persons who take any portion of the es-

39	25
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tate under the statute of descents, or who would have thus taken, did they not take by virtue of a will. A widow taking by will is an heir.

SAME.—*Chose in Action.*—The words "other property," in the proviso, do not apply to an action brought upon evidences of debt or things in action, which belonged to an ancestor and descended under the statute to an heir, or were bequeathed by a will to a person who would have inherited under the statute.

SAME.—*Assignment of Claims.*—Under the first proviso of said act regarding witnesses, the assignment of uncollected claims, when made in the mode prescribed for assigning such claims to heirs or legatees, does not restore the competency of witnesses, who would have been incompetent if the action had been brought by an administrator or executor.

APPEAL from the Harrison Circuit Court.

BUSKIRK, C. J.—This was an action brought by the appellants, before a justice of the peace on a promissory note, executed by the defendant below, and appellee here, on the 1st day of July, 1856, payable to Samuel H. Keen, who was then in full life, which note was afterward, on the 22d day of April, 1866, assigned by Robert Leffler, executor of the last will and testament of said Keen, deceased, to Ella Keen (now Peacock), one of the appellants, and sole legatee under the said will, which assignment was made in pursuance of an order of the court of common pleas of Harrison county, under the provisions of section 110 of "an act providing for the settlement of decedents' estates."

Judgment was rendered by the justice of the peace in favor of the plaintiffs, from which the defendant appealed to the circuit court, in which court a judgment was rendered for the defendant.

The plaintiffs moved the court for a new trial, which motion was overruled, and the plaintiffs excepted.

Upon the trial of the cause, the following facts were admitted to be true: That said Samuel H. Keen had departed this life; that prior to his death he executed his last will and testament, by which he devised all of his real and personal property to his then wife, and now one of the plaintiffs; that Robert Leffler was appointed the executor of said will, who qualified as such; that on the 26th day of April, 1866, the said executor had paid all the debts against the estate

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of said Keen; that the note sued on was a part of the assets of said estate, and as such was assigned by the said Leffler, executor as aforesaid, to Ella Keen, who was at that time Keen's widow; that said assignment was made by and in pursuance of an order of the court of common pleas of Harrison county, in order that the executor might settle the estate. The plaintiffs made all the proof that was necessary to entitle them to recover, if no defence was made.

The defence was that the defendant had paid and discharged the note in suit to Keen in his lifetime. The defendant offered himself as a witness in his own behalf, and over the objection and exception of the appellants he was permitted to testify in reference to the payment of the said note.

This ruling is assigned for error, and is the principal question discussed by counsel in their briefs.

It is claimed by the appellants that the appellee was rendered incompetent as a witness by the first and second provisos to the second section of "an act defining who shall be competent witnesses," etc., approved March 11th, 1867. See 3 Ind. Stat. 559.

The first section of the above act defines who are competent witnesses, and renders any person, a party in a civil action, competent to testify in his own behalf, or in behalf of any other party or parties therein.

The second section defines who are incompetent as witnesses. There are two provisos to this section, which read as follows:

"Provided, that in all suits where an executor, administrator or guardian is a party in the case where a judgment may be rendered either for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause, except in cases arising upon contracts made with the executor, administrator or guardian of such estate." * * * * *
"And provided further, that in all suits by or against heirs,

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founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause, and the assignor of the plaintiff in any such suit, where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision."

Pursuing the order adopted by counsel in their briefs, we will, in the first place, consider the second proviso. Two questions, as applicable to the case under consideration, arise under such proviso; and they are, first, whether Mrs. Peacock, being the sole devisee and legatee under the will of her former husband, can be regarded as an heir within the meaning of the said proviso; and, second, whether the above proviso embraces a chose in action.

The general rule laid down by the statute under examination is, that all parties to a civil action are competent witnesses in their own behalf, or in behalf of other parties to such action. The above proviso makes an exception to the general rule by which either party to an action by or against heirs is disqualified.

The first inquiry is, whether either party in this action sues or is sued in the capacity of heir.

PERKINS, J., in delivering the opinion of this court, in *Thomas v. Thomas*, 18 Ind. 9, remarked: "It may be said that, in this State, heirs are made as well by law, as by will, but are not born, are *hæredes facti*, not *nati*." It has been repeatedly decided by this court that the widow takes as heir to her husband.

It is said by Redfield, in his work on wills, that where the word heir is used in a will, it is to be construed as meaning "the next of kin, and as including those persons who would take the estate under the statute of distributions." If Keen had

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died intestate, his widow would have been his sole heir under our statute of descents.

We are clearly of the opinion that the word heirs as used in the above proviso was intended to include all persons, whether they took the estate under the law or by virtue of a will, in all cases where the devisee or legatee would have taken any portion of the estate under the statute of descents. Any other construction would be narrow and illiberal.

We are of the opinion that Mrs. Peacock should be regarded as an heir within the meaning of the above proviso. But, regarding Mrs. Peacock as the heir of her husband, does this case come within the above proviso? Is it the purpose of the above proviso to exclude parties in all cases founded on a contract with, or demand against, the ancestor, where heirs are parties, plaintiff or defendant? If the purpose was to exclude parties as witnesses in all cases, it seems to us that the legislature might have expressed such purpose in a much briefer and far more intelligible manner. It would only have been necessary to have said, "that in all suits by or against heirs, founded on a contract with, or demand against, the ancestor, neither party shall be allowed to testify," etc. This would have expressed the legislative intention in a very clear and unmistakable manner. If such had been the language, there would have been no room for doubt, or necessity of construction. But the language is quite different. It provides, "that in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify," etc.

It seems quite clear to us, that it was the purpose of the legislature to confine the rule in its operation to a particular class of cases. It is very manifest that it was not intended that it should apply to all cases where the suit was founded on a contract with, or demand against, the ancestor, but the difficulty is in determining in what particular actions the

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rule is to operate. It is very obvious, that in all actions by or against heirs, to obtain title to or possession of land of an ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify. The ambiguity arises upon the phrase, "or other property." The rules of construction laid down in the code may aid in placing a construction upon the words "or other property."

"The word 'land' and the phrases 'real estate' and 'real property,' include lands, tenements, and hereditaments.

"The phrase 'personal property' includes goods, chattels, evidences of debt, and things in action.

"The word 'property' includes personal and real property."

By the above rules of construction, when the phrase, "personal property" is used, it includes goods, chattels, evidences of debt, and things in action; but when the word "property" is used, it includes only personal and real property. We are of the opinion that the phrase "other property" should be construed not to embrace "evidences of debt and things in action," when a judgment for money is demanded. It was evidently intended to exclude as witnesses parties to an action brought by or against heirs to foreclose a chattel mortgage given by an ancestor, or to an action to recover the possession or determine the title to "property" other than "real estate," and it may apply to other cases that do not now occur to us. If we should apply the exclusion to evidences of debt and things in action, the rule would become general and apply to nearly all actions founded upon a contract with, or demand against, an ancestor, when brought by or against heirs.

The second proviso must be construed in connection with the first proviso, so that effect can be given to each. We are bound to presume that they were not intended to apply to the same classes of cases. The first excludes the living from testifying against the dead in all actions where an executor, administrator, or guardian is a party, where a judgment may be rendered either for or against an estate.

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The object of the actions contemplated by this section is to recover a judgment for money. They consist mainly of claims filed against an estate, and actions brought by executors, administrators, and guardians, on accounts and notes that were owing to the decedent in his lifetime. It also embraces actions upon contracts, agreements, and the like, where a judgment in money is sought. It is very seldom that an executor or administrator is either a proper or necessary party to an action, the object of which is to obtain title to or possession of lands or personal property; but where they are such parties, the other parties to the action are excluded from testifying.

The second proviso embraces actions brought by or against heirs, founded on a contract with, or demand against, an ancestor, the object of which is to obtain title to or possession of land or specific articles of property, or to affect the same in any way. This proviso was not intended to apply to actions, the object of which was to recover a judgment for money. It embraces actions to obtain the possession of land; for specific performance of contracts with the ancestor in reference to land; to quiet the title to lands, or to remove a cloud from such title; and actions to obtain the possession or try the title to articles of personal property; and there are doubtless other actions than those enumerated, to which this proviso will apply. This construction gives full force and effect to each proviso, and will, in our judgment, exclude the living from testifying against the dead in all the cases contemplated by the legislature.

We, therefore, hold that the above proviso does not apply to an action brought upon "evidences of debt or things in action," which belonged to an ancestor, and descended, under the statute, to an heir, or was bequeathed by a will to a person who would have inherited under the statute of descents.

We are next to inquire and determine whether the appellee was excluded as a witness under the first proviso above quoted. It is very clear that the language of the proviso

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would not render him incompetent; but we have, after very mature consideration, arrived at the conclusion that he comes within the spirit and legislative intention.

It is very manifest that the intention of the legislature, in enacting the proviso under examination, was to provide a protection against filing unjust claims against decedents' estates, and against setting up unjust defences to an action brought by the representatives of a deceased person, founded on a demand due to such decedent in his lifetime. The purpose was well expressed by this court, in *Malady v. McEnary*, 30 Ind. 273, where it was said, that "death having sealed the lips of one, the law seals the lips of the other." If, then, the purpose was to guard and protect decedents' estates, why limit the operation of the law to the time when the estate is represented by the executor and administrator? Such a construction would lead to an absurdity and great injustice. It would protect the estate while represented by the administrator or executor, but would afford no protection when the estate was represented, under the provisions of the statute, by the heirs at law, or the devisees and legatees under a will. The executor or administrator does not represent himself, nor does the heir or legatee, but the estate. The executor or administrator represents the estate until the debts are paid. The law then authorizes the executor or administrator to assign to an heir or legatee any unpaid claims due such estate. The statute reads as follows:

"Sec. 114. If at the time of the final settlement, all the claims against such estate, except legacies, be paid, and there remains due such estate any uncollected claim, if any legatee or heir whose share does not exceed the amount thereof will accept it in payment of so much of his share, the same shall be assigned or delivered to him by the executor or administrator, and the estate shall be finally settled." 2 G. & H. 518.

At the time the above act was passed, parties to an action were not competent witnesses for or against each other, but they were subsequently rendered competent. When the

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assignment is made in pursuance of the above statute, the administrator or executor ceases to represent the estate, but the representation is devolved by law upon the heir or legatee, and they thus become subrogated to the rights of such executor or administrator. The assignment cannot transfer a power different in nature from that which was possessed by the assignor. The assignment of the note in suit by the executor to the widow and legatee vested in her all the rights which the executor had, and entitled her to all the remedies for the collection of the note which might have been employed by such executor.

The rights of an executor in and to the things in action belonging to the estate which he represents are thus defined by Toller on Executors: "The interest which such representative has in the decedent's property is very different from that which belongs to his own. Instead of being an absolute interest, it is only temporary and qualified. He is not entitled in his own right, but in *auter droit*, in the right of the deceased. He is interested merely with the custody and distribution of the effects."

The executor of Keen had no title to the note in suit, but he acquired by the law the right to bring suit in his representative capacity, and the power to collect the note and apply the proceeds to the purposes of the estate; and when he assigned the note to the legatee, he did not assign any title that he had in the note, but he assigned to her the right to sue upon and collect the note. An executor or administrator who assigns a claim due an estate, under the above quoted section of the statute, assumes none of the liabilities which attach to an ordinary assignor. The assignment is by operation of law. The appellee would have been a competent witness in an action upon the note brought by the decedent in his lifetime. The death of Keen rendered him incompetent. It is conceded that if the action had been brought by the executor, the appellee would have been an incompetent witness. Then how was his com-

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petency restored? The law which rendered him incompetent has not been altered or repealed. The note belonged to Keen at his death, and by virtue of his will, the title to it was vested in his widow, who was his sole legatee, as it would have descended to her under the statute of descents if there had been no will. The note belonged to her from the death of her husband, subject to the prior and paramount lien of the creditors of the decedent. When the debts were paid, the executor was authorized by our statute, by an assignment, to confer upon the legatee the power to sue for, collect, and apply the proceeds to the payment of the legacy created by the will. If the suit had been brought by and in the name of the executor, the money, when collected, would have been applied by him to the payment, first, of the expenses of the administration; second, to the payment of the ordinary debts; and third, to the payment of the legacies. The expenses of administration and the ordinary debts having been paid, the executor, by his indorsement of the note, delegated to the widow and legatee the power to collect the note and apply the proceeds to the payment of the legacy created by the will.

We have seen that the object of the law was to protect estates from the payment of unjust claims, by preventing the living from testifying against the dead. This is effectually done while the estate is represented by an executor or administrator. The plain and obvious purpose of the legislature, in authorizing an assignment of claims that remained uncollected, after the payment of the debts of the estate, other than legacies, was to save the estate from the expense of keeping it in court, and this commendable object would be completely defeated if such assignment would restore the competency of persons as witnesses, against whom the claims were assigned. If the legislative intent is carried into effect, we are unable to see how the appellee can occupy any better or more favorable position, when the estate is represented by the heir or legatee, under an assignment, than he would when it was represented by the execu-

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tor. The estate of the deceased must be protected, no matter by whom represented. It is our duty to give effect, if it can be done consistently with the rules of construction, to the statute authorizing the assignment of uncollected claims after the payment of the debts. It is a wise provision. Suppose a man in declining health owns real estate worth ten thousand dollars; he desires to make suitable provision for his family; and knowing their inability to manage the farm, he sells it for ten thousand dollars, on a credit of ten years, payable in equal annual payments, with interest. The notes are made payable to him. He dies. Under our statute there must be administration upon his estate, whether he dies testate or intestate. Letters of administration, with or without a will annexed, are taken out. By the end of the year, the administrator or executor has collected enough of the claims to pay the expenses of administration and all the debts against the estate. At this point the statute says that the estate may be settled, if the heirs at law or the legatees are willing to take an assignment of the uncollected claims. By this statute, the expenses of keeping the estate in court for nine years are saved. But what heir or legatee would consent to take an assignment of the notes if it opened the door to defences that would not exist if the estate was represented by an administrator or executor? They would say that they would prefer to incur the expense of continuing the estate in court, rather than to jeopardize the collection of the notes.

In our opinion, after very careful and mature consideration, we can only give full force and effect to the statutes under consideration, and carry out the plain and undoubted legislative intention, by holding that the assignment of uncollected claims, when made in the mode prescribed in the above section of the statute, will not restore the competency of witnesses, who would have been incompetent if the action had been brought by an administrator or executor.

We, therefore, hold that the court below erred in permit-

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ting the appellee to testify as a witness, for which error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in conformity with this opinion.

W. N. Tracewell, for appellants.

W. A. Porter and *T. C. Slaughter*, for appellee.

THE STATE *v.* KINNEMAN ET AL.

FEES.—*Criminal Law.*—Under the present statute (Acts 1871, p. 26, sec. 5), on an indictment or information against two or more, a separate docket fee is chargeable against each defendant who pleads guilty, or who is convicted on a plea of not guilty.

APPEAL from the Grant Common Pleas.

WORDEN, J.—Information for riot against the appellees and others. The appellees pleaded guilty, and they were severally fined. The district attorney moved that a docket fee be taxed against each of the appellees, but the court overruled the motion, and allowed but one docket fee to be taxed in the cause. This ruling presents the only question arising in the case.

Under a statute of 1831, which provided a docket fee "for every conviction upon an indictment or presentment on plea of not guilty," it was held that the prosecuting attorney was entitled to a docket fee against each person convicted on the same indictment. *The State v. Cripe*, 5 Blackf. 6. Under the statutes of 1852, it was held that the prosecutor was only entitled to one docket fee in any case, whatever might be the number of defendants. *Bunday v. The State*, 6 Ind. 398.

The question must depend upon the construction of the statute of 1871, which governs the case. That statute provides as follows:

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"The prosecuting and district attorneys' fees shall be as follows, to wit:

Docket fee on plea of guilty in felony..... \$7 00
Docket fee on plea of guilty in misdemeanor..... 5 00
* * * * *

Docket fee on plea of not guilty in felonies..... 10 00
Docket fee on plea of not guilty in misdemeanor.... 7 00

See Acts 1871, p. 26, sec. 5.

In giving a construction to this statute, it should be borne in mind that in joint prosecutions against two or more persons, each one is liable to the punishment inflicted upon himself only, and is not jointly liable with his co-defendants. He suffers the punishment due to his transgressions, but not for the sins of his co-defendants. The punishment inflicted upon one may be greater or less than that inflicted upon another. The judgment should be against each separately (though they may be all embraced in the same entry), and there should not be a joint judgment against all. *The State v. Hopkins*, 7 Blackf. 494; 1 Bishop Crim. Law, sec. 732, *et seq.*

The statute above quoted does not provide (like the statute of 1852, quoted in the case cited from 6 Ind.) for a docket fee in a "case," but it provides for a docket fee on a "plea." In this respect it differs essentially from the statute of 1852. There must be as many pleas as there are defendants arraigned upon a criminal prosecution. Each defendant pleads for himself. Then there may be different pleas by different parties to the same indictment. On a plea of guilty in misdemeanors, the docket fee is five dollars, but on a plea of not guilty, on conviction, the docket fee is seven dollars. If there is to be but one docket fee charged in a case, what would it be where two or more are prosecuted, and some plead guilty and some not guilty, those pleading not guilty being convicted? Would it be five or seven dollars?

If the larger sum be taxed as a docket fee, will it be apportioned amongst the parties? or will they all be jointly

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liable for it? If they are all to be jointly liable, it might turn out that the man who pleaded guilty would have to pay the price of pleading not guilty.

We think, under the present statute, that on an indictment or information against two or more, a separate docket fee is chargeable against each defendant who pleads guilty, or who is convicted on a plea of not guilty.

The order of the court below in respect to the taxation of docket fees is reversed, with costs, and the cause remanded, with instructions to the court below to tax docket fees in accordance with this opinion.

F. L. Custer and B. W. Hanna, Attorney General, for the State.

R. W. Bailey, for appellees.

THE CINCINNATI AND MARTINSVILLE RAILROAD COMPANY AND
THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD
COMPANY v. TOWNSEND.

RAILROAD.—*Injury to Animals.—Two Railroads.—Pleading.*—The Cincinnati and Martinsville R. R. Co. v. Paskins, 36 Ind. 380, adhered to.

APPEAL from the Johnson Common Pleas.

DOWNEY, J.—Two errors are assigned by the appellants in this case; first, overruling the separate demurrers of the appellants to the complaint; second, overruling the motion of the appellants for a new trial.

The complaint, after the usual commencement, alleged that on the — day of October, 1868, at and in the county of Johnson, and State of Indiana, the said Indianapolis, Cincinnati, and Lafayette Railroad Company, while running and propelling their locomotive and cars along and upon that part of the road of the Cincinnati and Martinsville Railroad Company which is situated in said county of Johnson, and

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without any fault or negligence of the plaintiff, ran over, crippled, maimed, and injured one colt, the property of the plaintiff, of the value of ninety dollars, whereby said colt was damaged and rendered worthless, and of no value whatever; that at the time and place when and where said colt entered upon said railroad track, and where said injury was inflicted, said road was not securely fenced in, and such fence properly maintained.

And for a further complaint herein, said plaintiff says, that on the 20th day of June, 1870, at and in the county of Johnson and State of Indiana, the said Indianapolis, Cincinnati, and Lafayette Railroad Company, while running and propelling her locomotive and cars along and upon that part of the road of the Cincinnati and Martinsville Company which is situated in said county of Johnson, and without any fault or negligence of the plaintiff, ran over, crippled, maimed, and injured one heifer, the property of the said plaintiff, and of the value of thirty-five dollars, whereby said heifer was damaged and rendered worthless, and of no value whatever; and the plaintiff avers that at the time and place where and when said heifer entered upon said railroad track, and where said injury was inflicted, said road was not securely fenced in, and such fence properly maintained; wherefore, etc.

It is quite clear to us that the complaint in this case was insufficient, and that the demurrer thereto should have been sustained. For the reasons, see *The Cincinnati and Martinsville R. R. Co. v. Paskins*, 36 Ind. 380.

The judgment is reversed, with costs, and the cause remanded.

D. Howe, for appellants.

G. M. Overstreet and *A. B. Hunter*, for appellee.

Sims v. The Board of Commissioners of Monroe County.

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SIMS v. THE BOARD OF COMMISSIONERS OF MONROE COUNTY.

BOARD OF COUNTY COMMISSIONERS.—*Aid to Soldiers' Families.*—Appeal.—A., in March, 1869, filed her petition before the Board of Commissioners of Monroe County, alleging that she was the widow of a soldier who had served in the army of the United States from August, 1862, until the 26th day of June, 1865, when he was honorably discharged by reason of disability contracted in the service; that while in the service, he had a wife, the petitioner, and three children under twelve years of age; and that she was entitled to have and receive twelve month's pay at the rate of fourteen dollars per month, out of the fund collected in said county on the levy made under the act of March 4th, 1865, for the relief of families of soldiers, seamen, etc. The board of commissioners disallowed the claim, and the petitioner appealed to the court of common pleas, and by that court the appeal was dismissed.

Held, that as the later act of December 20th, 1865, in terms repealed the act of March 4th, 1865, and provided further, that all disbursements of the funds raised under the act repealed should cease on and after the 3d day of March, 1866, and as the claim of the petitioner was one to obtain a sum claimed to be due under the act of March, 1865, as modified by that of December, 1865, and as the claim was not made until long after the 3d of March, 1866, when disbursements were to cease, it was wholly within the discretion of the board of commissioners to allow it or not, and no appeal lay to any other court from the action of the board.

SAME.—*Case Overruled.*—Under the provisions of said act of December, 1865, none of the persons enumerated in the repealed act can claim, as a matter of right, any portion of the fund, since the 3d day of March, 1866. *Board of Commissioners of Clinton County v. McDowell*, 30 Ind. 87, overruled.

APPEAL.—*Board of Commissioners.*—There is no statute which authorizes an appeal from the action of the board of commissioners upon a matter involving no question of legal right, but simply a matter for the exercise of the discretion of the board.

APPEAL from the Monroe Common Pleas.

WORDEN, J.—This cause was once decided, but a rehearing was granted. The cause has been again submitted. After again considering the question involved, we are of opinion that the judgment below should be affirmed for the reasons stated in the opinion granting the rehearing, which is adopted as the opinion in the cause.

The judgment below is affirmed, with costs.

BUSKIRK, C. J., having been of counsel, was absent.

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ON PETITION FOR A REHEARING.

WORDEN, J.—On the 29th of March, 1869, the appellant filed her petition before the board of commissioners of said county, alleging that she was the widow of Robert Sims; that in the year 1865, there was levied and collected in Monroe county, under the act of March 4th, 1865, for the relief of the families of soldiers, seamen, marines, etc., the sum of fourteen thousand one hundred and sixty-six dollars and twenty-seven cents, of which the sum of two thousand five hundred and thirty-two dollars and eighty-seven cents was applied, under the provisions of the act for the relief of soldiers' families, leaving the sum of eleven thousand six hundred and thirty-three dollars and forty cents of the fund in the county treasury; that Robert Sims was mustered into the service of the United States as a private in Company B, 67th Regiment of Indiana volunteers, on the 19th of August, 1862, and that he continued in the service until the 26th of June, 1865, when he was honorably discharged by reason of disability contracted in the service; that he was not a commissioned officer during any part of the service; that he had, during the time of service, a wife and three children, being under the age of twelve years, who were dependent on him for support, and had not otherwise sufficient means for their comfortable support; that during said period, they were and still are residents of Washington township, in said county, and were duly enumerated in the enumeration taken in said township, under the provisions of said act, but were never paid anything thereunder; that they are entitled, under said act of 1865, to twelve months' pay, at the rate of fourteen dollars per month, making one hundred and sixty-eight dollars, for which they demand judgment.

The board of commissioners, after hearing and fully considering the claim, disallowed it, and the petitioner appealed to the court of common pleas, in which court the appeal was dismissed, and the appellant excepted.

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The only question in this court is whether the appeal was correctly dismissed.

In order to the correct solution of this question, it is necessary to examine the ground on which the supposed claim of the appellant is based.

By the act for the relief of the families of soldiers, etc., approved March 4th, 1865 (Acts 1865, general session, p. 93), it was provided that a tax be levied and collected for each of the years 1865 and 1866 of three mills on the dollar valuation of all the taxable property of the State, and one dollar on each taxable poll, for the purpose of supporting soldiers' families and sick and wounded soldiers in hospitals.

This fund, when collected, was to be paid into the State treasury, and one hundred thousand dollars thereof for each year was to be expended, under the control and direction of the governor, for the relief of sick and wounded Indiana soldiers in hospitals. The residue of the fund was to be paid over to the several county treasurers at their semi-annual settlement with the State, according to an apportionment provided for. When thus paid into the county treasury, the fund was to be under the control of the commissioners for the purpose named in the act, who were to apportion the same to the several townships in the manner provided for, and was to be paid over, on the warrant of the county auditor, to the several township trustees, in equal monthly proportions, and was to be distributed by the several trustees for the relief of the families of non-commisioned officers, musicians, and privates in the service, who had not otherwise sufficient means for their comfortable support, such fact to be determined by the disbursing officer; but any applicant dissatisfied with his decision might refer the same to the board of commissioners, whose decision should be final. The money was to be disbursed as follows: To the wife or mother dependent on a soldier, eight dollars per month; to each child under the age of twelve years, two dollars per month; and if the child be motherless, four dollars per month, subject to abatement if the sum raised

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should be insufficient to pay said amounts. The commissioners were authorized to borrow money for the purposes of the act, in anticipation of the reception of the money arising from the tax.

This is a brief statement of the act in question, without going into the details of the provisions for the accomplishment of the general purpose thereof.

On the 20th of December, 1865, an act was passed, the first section of which, in terms, repealed the act above specified. Acts Special Session 1865, p. 59. The residue of the latter act is as follows:

"Sec. 2. The taxes levied in pursuance of the provisions of the above entitled act, for the year 1865, shall be collected and retained in the several counties where the same was levied, under the control of the board of county commissioners, and by them applied in conformity with said act, as if the same were still in force, subject to the provisions herein recited.

"Sec. 3. On and after the third day of March, 1866, all disbursements from such funds to the persons in said act enumerated shall cease, and the unexpended balance of such levy for the year 1865 shall, when collected after the payment of such sums of money with interest thereon as may have been by the board of commissioners borrowed, in pursuance of the provisions of section twelve of the above entitled act, be held and retained in the treasuries of the several counties where the same was levied and collected, as other county revenue; and it shall be the duty of the boards of commissioners of the several counties to provide, in such manner as they shall deem best, in a liberal manner from said fund, or from the general fund of the county, for the necessary support of needy persons of the following classes, to wit:

"First. Non-commissioned officers and soldiers who have been or are now, or shall hereafter become disabled, by reason of wounds or diseases, incurred or contracted in the

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line of duty, in the service of the State or of the United States, in the late war for the suppression of the rebellion.

"Second. The wives and children and mothers, who were dependent on such soldiers; the widows and children of all officers and soldiers who were killed, or died from wounds or disease done or contracted in the line of duty in such service, or who have since died, or who shall hereafter die from any of such causes. But in no case shall the beneficiaries of this act be included among the poor, provided for by the existing laws, nor shall they be sent to the county infirmaries provided for such.

"Sec. 4. The treasurers of the several counties shall pay over to the state treasurer five per cent. of all the taxes levied and collected or to be collected under the provisions of said act for the year 1865, out of which five per cent. shall be paid any indebtedness incurred or created by the governor in anticipation of the one hundred thousand dollars appropriated by the second section of the above named act, for the year 1865, for the relief of sick and wounded Indiana soldiers in hospitals and the residue of the said five per cent. may be applied, under the direction of the governor, to the relief of sick, destitute, wounded or disabled Indiana soldiers, who have been honorably discharged and may need such assistance, and the amount and manner of such expenditure shall be reported by the governor to the next general assembly.

"Sec. 5. Nothing in this act shall be construed so as to prevent the boards of commissioners of any county from allowing to the families of soldiers the amount to which they are entitled by the provisions of the act hereby repealed for the year 1865, in all cases where the same has not been allowed.

"Sec. 6. It is hereby declared that an emergency exists for the immediate taking effect of this act, and the same is therefore declared to be in force and effect from and after its passage."

It will be seen, by reference to the second section of the

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act above set out, that the taxes levied for the year 1865 were, notwithstanding the repeal of the former law, to be collected, but instead of being paid into the state treasury, they were to be retained in the several county treasuries, and be under the control of the commissioners, and by them applied in conformity with the repealed act, as if the same were still in force, subject, however, to the provisions of the repealing act.

Among the essential provisions of the latter act are these: that all disbursements of the funds to the persons enumerated in the repealed act shall cease on and after the 3d of March, 1866, and that the unexpended balance of such levy for the year 1865, after paying any sum with the interest thereon which the commissioners might have borrowed under the provisions of the repealed act, should be retained in the county treasuries as other county revenue.

We think that, under this provision, none of the persons enumerated in the repealed act can claim, as a matter of right, any portion of the fund in question after the time limited for the disbursement thereof, viz., the 3d of March, 1866, although the claim may be for time that elapsed previously to that date. The statute above quoted says, that "disbursements" from the fund shall cease on and after that day. Disbursement, according to the standard lexicons, is the act of paying out. If paying out is to cease on that day, by what right can a party claim that it shall be continued after that day, although he claims for time that elapsed before that day? That the legislature used the term "disbursements" in its ordinary sense, and as synonymous with paying out, is shown by the provision that the "unexpended balance" of the fund, after paying borrowed money and interest, should be retained in the county treasury as other county revenue. This "unexpended balance" must have reference to the balance unexpended at the time when the disbursements were to cease; and that balance was to be retained in the treasury of the county as other county funds. This is utterly inconsistent with the idea that the

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persons enumerated in the repealed act have a legal right to claim the fund after that time.

The conclusion, that by the terms of the statute in question, the parties enumerated in the repealed act have not the right to claim any part of the fund after the time limited for the disbursement thereof, is placed beyond doubt by the fifth section, which provides, that "nothing in the act shall be so construed as to prevent the board of commissioners of any county from allowing to the families of soldiers the amount to which they are entitled by the provisions of the act repealed, for the year 1865, in all cases where the same has not been allowed." These provisions, taken altogether, amount to this, that the disbursements shall be obligatory upon the counties until March 3d, 1866, and no longer; but the board of commissioners of any county may, nevertheless, allow to the families of soldiers after that time, where it has not been allowed. It is entirely discretionary with the board, whether they will make such allowance after the time limited. They are authorized, but not required, to make such allowance.

The right of the persons enumerated in the repealed act, to the money, can in no sense be regarded as a vested right before the money is paid over to them. It does not depend upon contract, the obligation of which cannot be violated, but simply upon the bounty of the State, well bestowed upon the families of soldiers who were periling their lives in the service of the country. But this bounty might be given or withheld at any time by the State, at the pleasure of the legislature.

If the right to the money became a vested right before the persons enumerated received it, it must have been vested by the passage of the original law; and if that gave them such a vested right as could not be taken away, it follows that the repeal of the law is void, and the persons enumerated are yet entitled to the fund for both the years 1865 and 1866. We think it was clearly within the power of the legislature to provide that disbursements under the law

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should cease at the time specified. This provision was in itself reasonable, as it gave the parties interested, who were entitled to monthly disbursements for their support, between two and three months after the passage of the law, in which to make application for the bounty of the State, which was intended to supply their daily wants and necessities.

The conclusion at which we have arrived, from an attentive examination of the statutes in question, is, that the persons enumerated in the repealed act are not entitled, as a matter of right, to any portion of the fund in question where they did not claim it within the time limited for the disbursement thereof, and that they cannot maintain an action therefor; but that the board of commissioners of the proper county may, in their discretion, allow it to them. We think also that, as the allowance by the board, or their refusal to allow the same, is a matter purely in the discretion of the board, no appeal lies to any other court from the exercise of such discretion.

We are aware that in the case of the *Board of Commissioners of Clinton County v McDowell*, 30 Ind. 87, it was held that the persons enumerated in the repealed act, though they had not claimed the benefit of the fund before the time limited for the disbursement thereof, were entitled to the benefit of the same, as a matter of right, for the time which elapsed before the disbursements were to cease, and that they could recover the same by suit.

We have not been able to bring our minds to the same conclusion, and however reluctant we may be to overrule former decisions of this court, a sense of duty impels us to give the statute in question the interpretation we have indicated.

As we have said, the allowance or disallowance of the claim was, as we think, a matter resting purely in the discretion of the commissioners, from which no appeal lies to any other tribunal.

There is yet another reason why, in our opinion, no appeal lies from the action of the board. We have seen that, up to

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March 3d, 1866, the fund was to be applied in conformity with the original act, the same as if it were still in force, subject to the provisions of the repealing act. One of the provisions of the original law was, that the money should be distributed for the relief of the families of non-commisioned officers, musicians, and privates in the service who had not otherwise sufficient means for their comfortable support, such fact to be determined by the disbursing officer; but any applicant dissatisfied with his decision might refer the same to the board of commissioners, whose decision should be final. We see no good reason, under this law, why the decision of the board, as to whether a party applying for the benefit of the fund was entitled to it or not, should not be regarded as final. This, however, is an incidental question, and we rest our decision on the ground mainly that the allowance or disallowance is a matter for the exercise of the discretion of the board of commissioners, from which no appeal lies.

Looking at the case from another stand-point, it may be observed that the act of December makes it the duty of the several boards of commissioners "to provide in such manner as they shall deem best, in a liberal manner from said fund, or from the general fund of the county, for the necessary support of needy persons" of the classes therein named.

Perhaps the petitioner is shown to be within one of the classes named in this statute, but the application is evidently not intended to obtain the relief thereby provided for. The petition does not show that the petitioner or the children were "needy" at the time of the filing thereof. It does not make a case for relief under the new provisions of the law of December, but in its whole scope and purpose is intended to enforce a supposed right under the previous law of March as modified by that of December.

As the case made is not one for relief under the new provisions of the law of December, we need not determine whether an appeal lies from the action of the board under

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those new provisions. We may say, however, that it would seem that the commissioners must be the exclusive judges of the manner and extent of the provision to be made for the classes named in the law. Perhaps if the commissioners refuse to act under the law, a writ of mandate would lie to compel them to act; but when they have acted in the matter, and determined the manner and extent of the provision to be made, it is difficult to say that any court can, on appeal, disturb the action of the board. We desire, however, to decide only what is in the record before us.

We hold that the case before us is one to obtain a sum claimed to be due under the act of March, as modified by that of December, 1865, and that as the claim was not made until long after the 3d of March, 1866, when disbursements under the law were to cease, it was wholly in the discretion of the board of commissioners to allow it or not, and that no appeal lies to any other court from the action of the board. We have no statute which, in our opinion, should be construed to authorize an appeal from the action of the board of commissioners upon a matter involving no question of legal right, but simply a matter for the exercise of the discretion of the board.

In our opinion, the court below committed no error in dismissing the appeal; hence the petition for a rehearing is granted.

BUSKIRK, C. J., having been of counsel in the cause, was absent.

J. F. Pittman, A. J. Simpson, J. T. Cox, and J. B. Mulky,
for appellant.

*S. H. Buskirk, J. W. Buskirk, G. A. Buskirk, J. S. S.
Hunter, and M. M. Ray,* for appellee.

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HAWKINS *v.* NATION.

EVIDENCE.—Evidence of fraud in procuring the execution of a promissory note is not admissible under a plea of want of consideration.

PLEADING.—*Practice.*—*Striking Out.*—It is error to strike out an answer specifically setting up fraud in procuring the execution of a note, on the ground that the answer is the same as a plea of want of consideration.

APPEAL from the Howard Common Pleas.

PETTIT, J.—This was a suit by appellee against appellant on a promissory note. The complaint is in the usual and proper form. Answer in three paragraphs; first, want of consideration; the second and third paragraphs of the answer were as follows:

"The defendant, for a second paragraph of his answer, says that he admits the making of the note sued on, but says that said note was obtained by the plaintiff from the defendant by the false and fraudulent representations of the plaintiff, in this: the plaintiff at the time of the giving of said note, and long before, falsely represented to the defendant that he, the plaintiff, was a member of a pretended ditching association in Howard county, Indiana, called the Deer Creek and Honey Creek Ditching Association; and that there had been assessed against the defendant's land, as benefit, the sum of two hundred dollars; and that he, the plaintiff, had been authorized by the board of directors of said ditching association to collect the assessment so made against the defendant's land; and that he, the plaintiff, was the legally authorized agent of said ditching association; and that as such agent, and by the authority of said board of directors of said ditching association, he had full authority to collect said assessment so made against the defendant's land; and that if the defendant would give him his note for one hundred and twenty-four dollars and twenty cents, he, the plaintiff, would release the defendant from the payment of said sum of two hundred dollars, the assessment as represented by the plaintiff to have been made against the defendant's land; and defendant avers that the said plaintiff

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was not the legally authorized agent of said ditching association, nor had the said plaintiff ever been authorized to collect the assessment so made against the defendant's land by the board of directors of said ditching association. Defendant further avers that there never had been any legal assessment made by said Deer Creek and Honey Creek Ditching Association, as benefits against defendant's land; and defendant further avers that the plaintiff had no legal authority from the board of directors of said ditching association, nor was he the legally authorized agent of said ditching association; but the defendant says that being wholly ignorant of the authority of the plaintiff to collect said assessment, or the making of the said pretended assessment, but relying upon the false and fraudulent representations as aforesaid, made by the plaintiff, he was induced to and did give the note sued on, but without any good and valid consideration whatever; so the defendant says that said note was obtained from the defendant without any consideration; wherefore defendant asks judgment for his costs.

"And defendant, for a third paragraph of his answer, says that before the making and giving of the note sued on, the plaintiff came to the defendant and represented to the defendant that his, defendant's, land had been legally assessed, with two hundred dollars as benefits, by the Deer Creek and Honey Creek Ditching Association, and that said assessment was due, and that if the defendant would give him his (defendant's) note for one hundred and twenty-four dollars and twenty cents, he, the plaintiff, would release the defendant from the payment of said assessment; and defendant avers that in truth there never had been any legal assessment made against defendant's land, nor was the said land assessed by the Deer Creek and Honey Creek Ditching Association, nor was there any such assessment due against the defendant; for defendant avers that there had never been any dividend made by the said board of directors of said ditching association; but defendant says that from the false and fraudulent representation so as aforesaid made by the

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plaintiff, he was induced to, and did, execute the note sued on to the plaintiff, without any consideration whatever; wherefore defendant demands judgment for his costs."

The plaintiff filed a motion to strike out the second and third paragraphs of the answer, because they are the same as the first paragraph, which motion was sustained and exception taken; and this ruling is assigned for error. Are these paragraphs of the answer the same? or could the evidence which might be given under the second and third be given under the first paragraph of the answer? The first was want of consideration, under which evidence of no consideration only could have been given.

The second paragraph of the answer is one of fraud, with clear statements and showing of the facts and circumstances that constituted the fraud, and the evidence that was admissible under this paragraph was not admissible under the first paragraph of the answer. Fraud vitiates all contracts, and it could not be more clearly charged than in the second paragraph of the answer.

The third paragraph of the answer need not be noticed further than to say that it is a nondescript. We cannot see why not making a dividend by the directors should be a defence to the action.

We must reverse the judgment for the striking out of the second paragraph of the answer. 2 G. & H. 102, sec. 77, and references. The second paragraph was clearly a good defence.

The appellee has not furnished us with a brief or a suggestion as to the correctness of the rulings, nor have we been much aided by the scribbling and unreadable brief of the appellant, but we have been forced to study the transcript itself.

The judgment is reversed, at the costs of the appellant.
J. W. Robinson, for appellant.

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JUDGMENT.—Purchase Before Execution.—Although a judgment by confession has been obtained against a debtor, yet another creditor who purchases the personal property of the debtor without fraud, and to secure a precedence over the judgment, before an execution has been issued thereon, is entitled to the advantage obtained, although the debtor may have acted in bad faith toward his judgment creditor, the purchaser having no notice thereof.

APPEAL from the Warren Circuit Court.

BUSKIRK, C. J.—This was an action of replevin brought by Louisa Whickear against the appellants, to recover the possession of a part of a stock of groceries, levied upon by the marshal of the city of Attica, to satisfy an execution in his hands issued by the mayor of said city on a judgment in favor of the appellants, and against David H. Jenkins and Newton F. Yount, for the sum of two hundred and thirty-two dollars and sixty-one cents. The action was commenced in the mayor's court of the said city of Attica. The case was tried in said court by a jury and resulted in a verdict for the plaintiff. The case was appealed by the appellants to the Fountain Circuit Court. In that court the venue was changed to the Warren Circuit Court. In the Warren Circuit Court the death of the plaintiff was suggested upon the record, and the appellee, as administrator of said estate, was substituted as plaintiff, and the subsequent proceedings were had in his name.

The cause was tried by a jury and again resulted in a finding for the plaintiff. The appellants moved for a new trial, on the grounds that the verdict was contrary to law and was not supported by the evidence. The motion was overruled, and proper exceptions were taken to such ruling.

The refusal of the court to grant a new trial is assigned for error. We are asked to reverse the case upon the weight of the evidence, which is in the record by a bill of exceptions.

The material facts as disclosed by the evidence are these: David H. Jenkins and Newton F. Yount composed the firm of David H. Jenkins & Co., and were engaged in the

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grocery business in the city of Attica. The said firm was indebted to the appellants for groceries sold and delivered in the sum of two hundred and thirty-two dollars and sixty-one cents, and was also indebted to the original plaintiff in the sum of about sixteen hundred dollars for money loaned, which was invested in said business. These debts were evidenced by notes. On the first day of November, 1869, Jenkins & Yount confessed a judgment in favor of the appellants for the amount due on said note, in the mayor's court of said city, with an agreement on the part of the appellants that no execution was to issue unless it became necessary to secure a prior lien on the stock of groceries, and upon the further agreement that appellants should furnish said firm with more goods to enable the partners to continue the business. Some few hours after the rendition of the judgment, Jenkins went to the office of the attorney for appellants and represented to him that the fact that the firm had confessed a judgment in favor of appellants was known in the city, and that they could not continue business; that the said firm was indebted to the original plaintiff in this action, who was the sister of Jenkins, in the sum of fifteen or sixteen hundred dollars, and inquired of said attorney how the matter could be arranged so as to secure the residue of the said stock of goods, after the payment of the judgment of appellants, for his said sister on her claim against said firm; that said attorney advised that the original notes held by Mrs. Whickear should be surrendered up and new notes given for the amount due, in such amounts that judgments might be confessed on them in the mayor's court; that Jenkins consented to the plan proposed, and went to the residence of his sister, obtained the notes, took them to said attorney and left them with him, he agreeing to have the notes ready by next morning, when judgments were to be confessed on the new notes; that on that night Jenkins & Yount made an invoice of their stock of goods, fixtures, etc.; and that while so engaged the said attorney went into the store and inquired of Jenkins what his object was in

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making such invoice, when he answered that he was separating their goods from such as they had on commission; that early the next morning Mrs. Whickear consulted an attorney as to whether she could by a purchase of said stock of goods obtain a priority over the judgment of the appellants, stating that her brother, Jenkins, desired that she should have said goods in preference to the appellants; that such attorney having ascertained that no execution had been issued upon said judgment, advised that the purchase might be safely made; that they proceeded to the store of Jenkins & Co., when Mrs. Whickear purchased the stock of groceries at the invoice price, which was six hundred and eighty-one dollars and fifty-eight cents; that a bill of sale was then prepared and signed by the said Jenkins & Yount and delivered to Mrs. Whickear, who then executed a receipt for said sum which was to be entered as a credit on her notes then in the possession of the attorney of appellants, for the purpose above stated; that thereupon the said stock of goods, fixtures, etc., were then placed in the possession of Mrs. Whickear; that in a very short time after such delivery the marshal of said city entered the said store with an execution that had been issued on the judgment in favor of appellants against Jenkins & Co., and by virtue thereof levied upon a part of said stock of goods to satisfy the same; but it is conceded by counsel that said execution was not issued until after the delivery of the goods to Mrs. Whickear; and that thereupon the plaintiff commenced her action of replevin for the goods so levied upon.

A judgment rendered in the supreme, circuit, or common pleas court, is a lien upon real estate and chattels real for ten years from the rendition thereof. Sec. 527 of the code, 2 G. & H. 264. There are exceptions to the general rule above stated. Where a transcript is filed, the lien dates from the time of filing. Sec. 529 of the code. Certain other judgments relate back to the commencement of the action. Sec. 414. In judgments on recognizances, the lien attaches as against the principal from the time the recogni-

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zance is taken, and as to sureties from date of judgment. Sec. 531, 2 G. & H. 265. A judgment rendered in the court of a justice of the peace or the mayor of a city is not a lien upon either real or personal property.

When the transcript of a judgment of a justice of the peace is filed in the clerk's office of the common pleas court, it is a lien on the real estate of defendant within the county from the time of filing. Sec. 540, 2 G. & H. 267.

An execution issued on a judgment in the circuit court or court of common pleas is a lien upon the goods and chattels of the defendant within the jurisdiction of the officer, from the time of its delivery to such officer. Sec. 413 of the code, 2 G. & H. 232.

An execution against property, issued to another county, binds the real estate of the defendant from the time of levy. Sec. 532, 2 G. & H. 265.

When an execution is issued by a justice of the peace, it shall be directed to any constable of the county, and such constable shall indorse on such execution the day and hour when it came to his hands; and from that time it shall operate as a lien on the property of the judgment debtor liable to be seized on it, which lien shall be divested in favor of any other writ in the hands of another officer, which shall be first levied on such property. Section 78 of the act defining the civil jurisdiction of justices, 2 G. & H. 601.

The mayor of a city possesses, within the limits of the city, the same civil jurisdiction as a justice of the peace. Section 17 of the act of incorporation of cities, 1867, 3 Ind. Stat. 67.

It is the settled law in this State, that the sale or transfer, by a debtor, of his property to or for the use and benefit of his creditors, is valid if made in good faith and for a valuable consideration; and the fact that the creditor knew that his debtor was in failing circumstances, and intended to make an assignment, will not render fraudulent a conveyance of real estate, or an assignment or sale of personal property, made simply for the purpose of securing an honest debt. A

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debtor in failing circumstances has the right to prefer his creditors, and pay one to the exclusion of others, if the transaction is free from bad faith or fraud. *Anderson v. Smith*, 5 Blackf. 395; *Hubbs v. Bancroft*, 4 Ind. 388; *Stewart v. English*, 6 Ind. 176; *Chandler v. Caldwell*, 17 Ind. 256; *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285; *Bloom v. Noggle*, 4 Ohio St. 45; *Driesbach v. Becker*, 34 Penn. St. 152.

A debtor may sell or assign his property, as well after as before suit is brought. *Stewart v. English, supra*.

But it is earnestly maintained by the counsel for the appellants, that the sale of the property in dispute was fraudulent, and therefore void. It is not pretended that Jenkins and Yount did not honestly owe Mrs. Whickear some fifteen or sixteen hundred dollars. To maintain a suit to set aside a conveyance or sale of property as fraudulent against creditors, it must be shown that the transfer from the debtor to his vendee was received with an intent to aid him in the commission of a fraud. *Stewart v. English, supra*; *The New Albany, etc., R. R. Co. v. Huff*, 19 Ind. 444; *Ruffing v. Tilton*, 12 Ind. 259; *Harrison v. Faquess*, 29 Ind. 208; *Bunnel v. Witherow*, 29 Ind. 123.

It is very obvious, from the evidence in the record, that Jenkins was guilty of treachery and falsehood toward the attorney of the appellants; but there is no evidence tending to show that Mrs. Whickear had any knowledge of such conduct, or that she had any fraudulent purpose. Her purpose was to secure a part of an honest debt, and this she had the right to do, although it defeated the payment of other creditors, if she was guilty of no fraudulent conduct. She, by her superior diligence, accomplished, by the purchase of the property, what the appellants attempted to do by obtaining a confession of the judgment. Until the decision of the case of *Lord v. Fisher, supra*, it was regarded as doubtful whether the confession of a judgment by a debtor in failing circumstances was not fraudulent as to other creditors.

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It was a race of diligence between the appellants and Mrs. Whickear. The appellants obtained the advantage in the start, by procuring a confessed judgment, but they lost the advantage thus gained by not taking out an execution. It is a clear case of misplaced confidence on the part of the attorney for appellants. Mrs. Whickear took advantage of the mistake of her adversary, and by a flank movement secured the property.

We are clearly of the opinion that she is entitled to the benefit of her diligence, for the law holds it commendable in a creditor to be diligent in his or her collections.

We think that the verdict was fully sustained by the evidence, and that the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

J. Buchanan, for appellants.

J. Poole and A. A. Rice, for appellee.

RIDGWAY ET AL. v. MANIFOLD, GUARDIAN.

WILL.—Construction.—Election.—A. devised to B. one hundred acres of land, the will containing the following provisions: "for which there is to be a charge made against him of one thousand dollars, to be by him paid into my estate two years from the time of his arriving at the age of twenty-one years; if he should not elect to take the land, then and in that case he is to have three thousand dollars in money, and is exempted from paying the one thousand dollars as above specified, and the real estate hereby bequeathed is to remain as the real property of my wife, subject to her disposal, and to be by her disposed of as by my will directed, with the residue of my real estate given her," etc. A. had no children, and B. was of no kin to decedent, but was taken by him when he was a babe to be raised, but was not adopted, and was named by the deceased after himself, and was eight years old at decedent's death.

Held, that looking at the whole will, and regarding the circumstances surrounding the testator, it was his intention to give B. a present estate in the land devised, subject to the payment of the one thousand dollars in two years after his majority. But if he should elect not to take the land and pay the one thousand dollars, in that case he was to be paid the three thousand dollars.

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Held, also, that it was evidently the intention of the testator that B. should have the land, and it required an election on his part to reject the land and claim the pecuniary provision, before he would be entitled thereto.

APPEAL from the Henry Circuit Court.

DOWNEY, J.—The appellee, guardian of Charles Benton Manifold, sued the appellants to recover certain real estate, and had judgment in his favor. The title of the said Charles Benton Manifold depends upon the will of Henry Manifold, which is as follows:

"I, Henry Manifold, of the county of Henry, and State of Indiana, of lawful age, being weak in body, but of sound mind and disposing memory, do make and constitute this as my last will and testament, hereby revoking and making void all former wills, and making and constituting this as my last will and testament concerning my worldly affairs that I may be possessed of at my decease.

"First. It is my will and desire that after my death my body be decently buried in a manner corresponding with my estate and condition in life.

"Second. I will and bequeath to my beloved wife, Anna Manifold, during her natural life, the following described real estate, to wit: The north-west quarter of section twenty-four, township eighteen, north of range eleven east, containing one hundred and sixty acres; also all my personal property after the payment of all my just debts and funeral expenses; and after her death, the same is to go to, and be equally divided between, Robert H. Taylor and Charles Benton Manifold, if they should prove to be sober and industrious, in equal proportions; and in case either of them should not prove sober and industrious, then, and in that case, their part or parts is to be and remain in my wife, to be by her disposed of as she may think best; and it is my will, wish, and desire that she shall use her discretion in disposing of the same if it should inure to her by death of either or both of them dying without issue of their bodies, or want of sobriety or industrious habits.

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"It is my will, and I bequeath to Charles Benton Manifold one hundred acres of land, the same being the south half of the south-east quarter of the north-west quarter of section three, township eighteen, range eleven east, containing twenty acres, and the east half of the south-west quarter of section thirteen, township eighteen, range eleven east, containing eighty acres, for which there is to be a charge made against him of one thousand dollars, to be by him paid into my estate two years from the time of his arriving at the age of twenty-one years. If he should not elect to take the land, then, and in that case, he is to have three thousand dollars in money, and is exempt from paying the one thousand dollars, as above specified; and the real estate hereby bequeathed is to remain as the real property of my wife, subject to her disposal, and to be by her disposed of as by my will directed, with the residue of my real estate given her; and it is my will and desire that after my death my executor hereafter named shall satisfy one thousand five hundred dollars of a mortgage given by Robert H. Taylor without any money or any other consideration for the act thus performed, that is, notes mentioned in said mortgage becoming due the years 1873, 1878, and 1883. I hereby constitute and appoint David Waltz my sole executor to execute this my last will and testament.

HENRY MANIFOLD, [SEAL.]

As it was proper that the court should know the circumstances surrounding the deceased, and in the light of which his will is to be construed, the parties have agreed upon the following facts:

"That the deceased died on the 6th day of August, 1866, leaving three thousand five hundred or four thousand dollars of personal estate, and the owner of lands described in the will given in evidence; that he left surviving him his widow, now Anna Ridgway, one of the defendants, who became insane a short time after his decease; and an inquisition of insanity was had and a guardian appointed for her, but he never took possession of the estate; that at the death of her husband she owned — acres of land in her own right, which

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she yet owns; that the decedent never had any children, neither had he any father or mother at his death, but had brothers and sisters; that Robert Taylor, named in the will, was taken by decedent, when eight years old, to raise, but was not adopted by him; and Charles Benton Manifold is of no kin to decedent, and is a bastard; was taken by decedent to raise when he was a babe, but was not adopted by him; that his parentage, on his father's side, was not known, and he was named after decedent by him, and was eight years of age at decedent's death; that he and Taylor were both raised by decedent; that decedent gave Taylor eighty acres of land and put him in possession when he was eighteen years old, and when he was nineteen he gave him a deed to the same, the land being estimated at four thousand dollars, the said Taylor giving his notes to decedent for two thousand dollars; that he allowed him to receive the rents and profits of said land from the time he was eighteen; he gave him a horse and some other articles of value, and schooled him; the land given to him is not described in the will; the tract of land in controversy was worth at his death —— dollars." Signed by counsel.

The real estate in controversy is that consisting of the twenty and the eighty-acre tracts mentioned in the will. It is contended by the learned counsel for the appellants that it required an election on the part of Charles Benton Manifold before the title could vest in him, and that he being an infant could not, during infancy, make such election. Hence it is insisted that the title descended to and must remain in the widow of the decedent until Charles Benton Manifold has arrived at the age of twenty-one years, and has made his election. It is claimed that the language of the will, "If he should not elect to take the land," etc., conveys a different idea, and requires a different meaning to be placed on the will than if it had said, "If he should elect not to take the land," etc. But we must not confine our attention to a single word or a few words of the will, but construe each part of it with reference to the other parts, and to the whole

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of it, and in the light of the surrounding circumstances. Any construction which would result in partial intestacy is to be avoided, unless the language of the will compels such construction. The intention of the testator is, when it can be ascertained, the governing criterion in the construction of his will. *Jackson v. Hoover*, 26 Ind. 511; *Stephens v. Evans' Adm'x*, 30 Ind. 39; *Cate v. Cranor*, 30 Ind. 292; *Lutz v. Lutz*, 2 Blackf. 72; *Baker v. Riley*, 16 Ind. 479; *Stevenson v. Druley*, 4 Ind. 519.

Looking at the whole will, and regarding the circumstances surrounding the testator, we are of the opinion that it was his intention to give to Charles Benton Manifold a present estate in the one hundred acres of land, subject to the payment of the one thousand dollars in two years after his majority. But if he should elect not to take the land and pay the one thousand dollars, in that case he was to be paid the three thousand dollars. If an election should be held to be necessary before the vesting of the title, and the election cannot be made while the devisee is a minor, then as the three thousand dollars is payable only after the election has been made by him, the construction contended for by counsel for the appellants would leave the boy without any provision for his maintenance and education during his minority. The circumstances forbid the idea that the deceased intended any such result. It can hardly be presumed that the testator would have taken the boy to raise, and have reared him to the age of eight years, and then, when he was as much as ever in need of his care and support, leave him without any provision whatever.

The doctrine of election is generally applied to cases where the person who is put to an election has some right or title in himself, independent of the will, which right or title the testator, by the will, attempts or assumes to dispose of or affect, giving to the party a right or title, by the will, to something else which belonged to the testator; as, if the testator should devise to A. a quarter section of land owned by him, and should, by the same will, attempt or assume to

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devise to B. a quarter section of land belonging to A. Here A. cannot claim the quarter section of land devised to him by the will, without giving full effect to the will by yielding up to B. the quarter section of land of which he is the owner, or making compensation to him for the loss of it. 2 Redf. Wills, 352; Story Eq., sec. 1075, *et seq.*

There are cases, however, where the devisee or legatee is required or allowed to elect between inconsistent or alternative devises or bequests in a will, where both belong to the testator, as in the case under consideration. . Here, however, we think it was evidently the intention of the testator that the devisee should have the land, and that it requires an election on his part to reject that provision and claim the pecuniary provision, before he would be entitled to it.

But if an election were necessary to enable the devisee to claim the land; instead of the three thousand dollars in money, it seems that he, although under disability, might make the election by himself or by his guardian. 2 Redf. Wills, 358, sec. 11, and authorities cited.

The judgment is affirmed, with costs.

M. E. Forkner and M. L. Bundy, for appellants.

F. Brown and R. L. Polk, for appellee.

DANIELS, TREASURER, *v.* STRADER ET AL.

TAX.—Special School Tax.—National Bank Stock.—Shares of stock in a national bank are liable to a special school tax.

APPEAL from the Jefferson Circuit Court.

WORDEN, J.—The appellees, who were owners of stock in the First National Bank of Madison, a bank organized under the laws of the United States, brought this action against the appellant, who was the treasurer of the county, to restrain the collection of a certain special school tax which

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had been levied by the proper authorities upon the shares of bank stock above named, upon the ground that the tax was illegal, as being levied for municipal purposes; and such proceedings were had as that the defendant was enjoined from collecting the tax. The defendant took the proper exception, and appeals to this court.

The precise question involved in the case was decided by this court, in the case of *Root v. Erdelmeyer*, 37 Ind. 225, where it was held that such tax was valid, and not subject to the objection urged. We are satisfied of the correctness of that decision; and for the reasons therein given, the judgment in this case must be reversed.

The judgment below is reversed, with costs, and the cause remanded.

H. W. Harrington and C. A. Korbly, for appellant.

C. E. Walker and W. S. Roberts, for appellees.

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141 113

CRANOR *v.* THE STATE.

CRIMINAL LAW.—Affidavit.—Justice of the Peace.—Where an affidavit for an assault and battery is the basis of a prosecution before a justice of the peace, the defendant may be tried thereon on appeal without any information being filed. But such affidavit must enumerate and charge all the substantial elements that enter into the statutory description of the offence. Such an affidavit, that fails to charge the act to have been unlawful and done in a rude, insolent, and angry manner, or that does not contain an equivalent allegation, is defective.

APPEAL from the Howard Common Pleas.

WORDEN, J.—The appellant was prosecuted in a criminal action before a justice of the peace, on the following affidavit, viz.:

“State of Indiana, Howard county, ss. Joseph Miller swears that on or about the 16th day of April, 1871, in said county, Leroy Cranor, as the affiant verily believes, did

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commit an assault and battery on the person of one Elizabeth Golding, by running a horse against and over said Elizabeth Golding, in violation of the peace and dignity of the law of the State of Indiana.

[Signed:]

"J. H. MILLER."

The appellant was tried and convicted before the justice; and he appealed to the court of common pleas, where he moved to quash the affidavit, but his motion was overruled and he excepted. He was then tried upon the affidavit and again convicted, and judgment was rendered against him over his motion in arrest, which was overruled, and to which ruling he excepted.

The only question presented in the case is as to the sufficiency of the affidavit. The affidavit was the basis of the prosecution before the justice, and on appeal the defendant might be tried thereon without any information being filed. This being the office performed by the affidavit, it should, in order to be valid, enumerate and charge all the substantial elements that enter into the statutory description of the offence. This results from the fact that we have no common law offences. No act, or series of acts, can be criminal under our law unless made so by statute, and then all the clements that are required by the statute to constitute the offence must exist, otherwise no offence is committed. The words used in a statute to define a public offence need not be strictly pursued, but other words conveying the same meaning may be used. 2 G. & H. 403, sec. 59. The facts charged, whether in the language of the statute defining the offence, or in other words conveying the same meaning, must embrace every thing that is necessary to constitute the offence as defined by the statute.

Our statute defining an assault and battery is as follows: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459, sec. 7.

Upon comparing the affidavit with the statute, it will be

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seen that there are two elements that enter into the statutory description of the offence which are not embraced at all in the affidavit, either in the language of the statute or other equivalent words. It is not alleged that the touching was "unlawful." This is an essential ingredient of the offence, and the omission is not supplied by anything that is alleged. For anything that is alleged, the appellant may have run the horse against and over the said Elizabeth by accident and against his will; in which event he would not be guilty of a crime, whatever might be his liability civilly. Again, it is not alleged that the act was done either in a "rude, insolent, or angry manner," nor is there any equivalent allegation. If the act were done by accident and without intent, it could not be said to have been done either in a "rude, insolent, or angry manner," and no crime would be committed.

We are of opinion that the affidavit was insufficient, and should have been quashed.

The judgment below is reversed, and the cause remanded.

N. P. Richmond and *C. E. Hendry*, for appellant..

B. W. Hanna, Attorney General, and *J. T. Stringer*, for the State.

39	66
138	582
39	66
136	538
39	66
137	489
39	66
140	383
142	188
39	66
150	423
39	66
163	91
39	66
166	195

GARRIGUS ET AL. v. THE BOARD OF COMMISSIONERS OF PARKE COUNTY.

STATUTE.—Construction.—Rule of.—The rule of construction, that "words importing the singular number only, may also be applied to the plural of persons and things" (sec. 798 of the code), is only to be applied to the words of a statute or instrument when the plain and evident sense and meaning of the words, to be derived from the context, render such a construction necessary to give effect to the intention of the maker of the statute or instrument.

SAME.—Title of Act.—The title of a statute may be a guide to the intention of the law-makers, where the statute appears to be ambiguous or doubtful.

SAME.—Railroads.—Aid by Counties to Railroad Companies.—Under the act of

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May 12th, 1869, "to authorize aid to the construction of railroads by counties," etc., it is not legal for the board of commissioners of a county to submit to the voters of the county a proposition to vote for or against an appropriation to two or more railroad companies at the same time, when the proposition is so submitted that the voters cannot vote for one and against the other, but must vote for both or against both.

SAME.—The rights and powers conferred by said statute can only be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the act.

APPEAL from the Parke Circuit Court.

BU SKIRK, C. J.—The appellants filed a complaint in the court below, to perpetually enjoin the collection of a tax that was levied by the board of commissioners of Parke county, to aid in the construction of the Indiana and Illinois Central Railroad and the Indiana Northern and Southern Railroad, which special tax was levied in pursuance of a vote that was taken in said county on the 13th day of November, 1869.

A demurrer was sustained to the complaint; to which ruling a proper exception was taken; and, the appellants refusing to plead further, final judgment was rendered for the appellee; from which judgment the appellants have appealed to this court, and have assigned for error the sustaining of the demurrer to the complaint.

The petition which was presented to the board of county commissioners, was as follows:

**"To the Hon. Board of Commissioners of Parke County,
Indiana:**

"The undersigned, freeholders of said county, would respectfully petition your honorable board to make an appropriation of money to aid the Indiana and Illinois Central Railroad and the Indiana Northern and Southern Railroad Companies, now duly organized under the laws of the State of Indiana, in the construction of said railroads in said county, by taking stock in, or donating money to, said companies, in the amount of two hundred thousand dollars in said county, one-half of the amount appropriated to be given to each company, not exceeding, however, two per centum

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upon the taxables of said county, on the condition, as to the said 'Indiana Northern and Southern Railway Company,' that they commence the work on their road between Brazil, in Clay county, and Attica, in Fountain county, within six months from the day of election making the appropriation, and that said company complete the building of said road within two years from said day, and that the town of Rockville, in said county, is made a point, and said road run within one-half mile of the town of Bridgetown, in said county."

The order of the board was as follows:

"Ordered, that the county auditor give notice, by publication in the 'Republican,' that there will be an election held, on Saturday, November 13th, 1869, in the several townships throughout said county, at the usual place of holding elections, for the purpose of taking an expression of the citizens of the county relative to being taxed for the purpose of aiding in the construction of the railroads as set forth in the above petition."

Various objections are urged against the validity of the levy of the special tax, but the conclusion at which we have arrived renders it unnecessary for us to consider and determine any of the questions that have been argued with so much ability by the learned counsel engaged in this cause, but one, and that is stated in the complaint, as follows:

"Second. Because the aforesaid petition indicates and asks an appropriation to two railroad companies, and because said election was holden in such a manner that the said voters could not vote for or against an appropriation to either of said railroad companies without voting for or against both."

The question is now presented for the first time, under the act of May 12th, 1869, whether it is legal for the board of commissioners of a county to submit to the voters of a county a proposition to vote for an appropriation in aid of two or more companies, when the question is so submitted

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that the voters cannot vote for one and against the other, but must vote for both or against both.

The question is one of great practical importance to the people of the State, and we have given it very thoughtful and mature consideration. We have been greatly aided by the very able and exhaustive oral argument with which we have been favored.

It is maintained by the appellants, that a vote for or against two railroad companies is illegal and void, for two reasons; first, that it is manifest from the language of the act under consideration that it was the intention of the legislature that the vote should be taken for or against an appropriation to aid in the construction of one railroad; second, that a vote which is taken for or against two railroads, where the voters do not have the right to vote for one and against the other, is against public policy, for the reason that it effects a combination of opposite and diverse interests, and produces a system of log-rolling, by which the proposition to aid two roads is carried, when, if the vote had been taken separately on each proposition, both might have been defeated, or one might be carried and the other defeated.

It is maintained by the appellee, that the title of the act in question should be considered, with the view of ascertaining the intention of the law-makers; and that the title of said act being in the plural, the singular number used in the body of said act should be construed to refer to the plural.

It is further maintained, that a vote for or against aid to two railroads is not against public policy, and will not prevent a fair and unbiased expression of the popular will; and that, as the act limits the amount which may be levied, in any two years, to two per centum upon the taxable property, there is no danger that unreasonable and oppressive burdens will be placed upon the tax payers.

It will appear from an examination of the act of May 12th, 1869, that where reference is made to the aid of railroads, it is invariably in the singular number. Nowhere in the body

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of the act is reference made to railroad companies. The following expressions will be found in the act: in the first section, "to aid a railroad company;" "to such company." In the third section will be found, "aiding in the construction of the railroad named in such petition." In the sixth section is the following: "to aid such railroad company." In the seventh section is this expression: "the appropriation to the railroad company." In the twelfth section occur these words: "such railroad appropriation." The propositions which are submitted to the voters are stated thus: "For the railroad appropriation;" "Against the railroad appropriation."

The following rule of interpretation is stated by Smith, in his work on Constitutional and Statutory Construction, sec. 545, p. 688: "In the interpretation of statutes, if the words used express clearly the sense and intention of the law, they must always govern. For, as we have seen, it is not permitted to interpret what is plain and manifest, as it stands in no need of interpretation. When an act is conceived in clear and precise terms—when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents to the mind."

But it is earnestly maintained by the learned counsel for the appellee, that "words importing the singular number only, may also be applied to the plural of persons and things." Sec. 798 of the code, 2 G. & H. 336.

This construction is only to be given to the words of a statute or instrument, when the plain and evident sense and meaning of the words, to be derived from the context, render such a construction necessary to give effect to the intention of the makers of the statute or instrument. We do not think we would be justified in placing such a construction upon the statute under consideration. Full effect and force can be given to the act without such a construction.

It is also maintained that the title of a statute may be a guide to the intention of the law-makers, and in support of

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this position reference is made to the following authorities: *Smith v. The State*, 28 Ind. 321; *The United States v. Palmer*, 3 Wheat. 610; *Lessee of Burgett v. Burgett*, 1 Ohio, 469; *Eastman v. McAlpin*, 1 Kelly, 157; *Cohen v. Barrett*, 5 Cal. 195.

The above proposition is correct, with this additional qualification, "where the statute appears to be ambiguous or doubtful." 1 Cooley's Blackstone, 59.

It was said by MARSHALL, C. J., in *The United States v. Palmer*, *supra*, that, "the title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature."

It was also said in *The United States v. Fisher*, 2 Cranch, 386: "On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction."

Judge COOLEY, in his work on constitutional limitations, page 141, states the law the same as the above, but adds: "Titles to legislative acts, however, have recently, in some states, come to possess very great importance, by reason of constitutional provisions, which not only require that they shall correctly indicate the purpose of the law, but which absolutely makes the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not in the purpose indicated in the title. These provisions are given in the note, and it will readily be perceived that they make a very great change in the law."

But it is not said by Judge COOLEY, or any other writer that we know of, that the constitutional provisions in reference to the titles of an act have so changed the rules of construction that the title may be looked to when the words of the statute

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are plain and unambiguous; and we do not think that such rules have been so changed. The only effect of such provisions in reference to titles of an act is to give greater weight and consideration to the title in ascertaining "the mind of the legislature," than was formerly given to titles, where the language of the act is ambiguous and doubtful.

The title of the act under consideration is as follows: "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies."

The constitution of Indiana provides that, "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Sec. 19, article 4, 1 G. & H. 39.

The subject-matter of said act is aid to railroad companies. Under our constitution all laws have to be general wherever a general law can be passed. A local or special law on the subject of aid to a railroad company would have been unconstitutional and void. And as the subject-matter of the act must be expressed in the title, the title of the act in question was made broad and comprehensive enough to embrace and apply to all railroad companies in the State. But it does not result that more than one railroad company can apply for such aid at the same time and in the same proceeding, where the vote must be for or against both. As we have seen, the title embraces all the railroad companies organized in the State, while the body of the act provides for separate and distinct proceedings on the part of the several railroad companies in obtaining aid in the construction of their respective roads. All are entitled to the benefits of the act, but each must receive the aid separately.

We are very clearly of the opinion that the plain and obvious purpose of the legislature, to be derived from the plain and unambiguous language of the act, was, that the

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voters of a county or township should have the privilege of voting for or against any proposition that might be submitted to them, without being compelled to vote for or against some other proposition that they would not have freely and of their own choice voted for.

The views above expressed are based upon the wording of the act, and what seems to us to have been the intention of the legislature. We are not without authority on the proper construction of the act in question. The act of May 12th, 1869, was copied mainly from a statute of Illinois, and the Supreme Court of that state have placed a construction upon such statute. It is well settled that where a statute is borrowed from the statutes of another state, the construction placed upon such statute by the courts of such state is entitled to great weight and consideration.

The Supreme Court of Illinois, in the case of *Supervisors of Fulton County v. The Mississippi and Wabash R. R. Co.*, 21 Ill. 338, placed a construction upon said statute. The court say: "Another objection has been made by complainants which we deem necessary to notice now. It is as to the manner in which this question of subscription to the stock of this road was submitted to the vote of the people." The court, after quoting two sections of the statute, proceed to say: "The order made by the board of supervisors of Fulton county, under this law, does not seem to be in strict conformity to it. The law evidently contemplates a vote for or against subscription, to some one company only, specifying the company. The order is for a subscription to the Mississippi and Wabash River Railroad Company, and the Petersburg and Springfield Railroad Company, seventy-five thousand dollars to each."

"This is not only not pursuant to the law, but is manifestly unfair. All elections, as well for measures as men, should be perfectly free, uninfluenced by any consideration, other than the merits of the individual man or measure proposed. We boast of the freedom of the elective franchise; should we not strive to swell the boast by its purity also?

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A single, isolated measure, such as a railroad, may not unite a majority of a county to whom it is proposed. It may favor, if constructed, one portion of a county more than another, and thereby be prevented from receiving a clear majority vote, such as the law clearly contemplates shall be given. Is it fair, in order to accomplish this object, to attach another measure to it, to be voted on at the same time, which may benefit the opposing portion of the county? The law never intended that two roads should be coupled together, and the people forbidden to vote for one if they did not also vote for the other, the one road being really a bribe offered for votes for the other. The truth is, the voters of Fulton have never had an opportunity to vote, and never have voted this subscription, for the question was at no time distinctly before them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people, and until that is done, until the naked, single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log-rolling. By this system, condemned as it has always been by the moral sense as well as sense of justice of the whole country, it should at this day find no favor in the courts. We do not hesitate to say, this proposition to vote on two roads at the same time was not authorized by the law, and is a fraud on the people.

"This tacking one measure upon another, is unjust in another view, as it gives the county court power to weigh down a popular single measure, by attaching odious measures to it, and thus virtually depriving the people of their right to vote on the one measure, the success of which would greatly promote their interests.

"Such maneuvering should be condemned everywhere, as unfair and unjust, and we so regard it."

The ruling in the above case was followed in two subsequent cases in that court, *The People, etc., v. County of Tazewell*, 22 Ill. 147; *Clarke v. The Board of Supervisors of Hancock*

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County, 27 Ill. 305, and such may be regarded as the settled construction of the law of that State.

The State of Iowa has a law very much like ours. The Supreme Court of that state has placed a construction upon the manner of submitting the vote to the people. In the case of *McMillan v. Lee County*, 3 Iowa, 311, the court say: "There is still another objection which we must regard as equally fatal to the validity of the proceedings, on which the authority claimed by the county judge in this instance, is based. Every proposition for the borrowing or expenditure of money by a county, and for the levy of a tax to pay the same, receives its vitality as a law from the majority of the votes of the people cast in its favor. Such being the case, we think it is evidently the policy of the law, no less than its spirit and intention, that the vote of the people should be permitted to be cast for or against the propositions submitted, with no restraint upon the free expression of their choice. We have said that in our opinion, the law contemplates unity and distinctness in the question authorized to be submitted, in contradistinction to the uniting of several questions in the same proposition, or the incumbering of any proposition with conditions not required or not permitted by the statute. The proceedings coming under our notice in this cause present a most forcible illustration of the wisdom of what we deem to have been the policy of the statute. The people were not called upon, nor were they permitted, to decide by their votes whether the county of Lee should borrow money for one purpose or object. No single question was submitted to their votes to be decided upon its own merits, or by the judgment of the people in its favor. Nor were three propositions submitted at once, to be voted upon and to be decided upon, either singly or in the aggregate. No question submitted was permitted to stand by itself, or to take effect upon the decision of the people in its favor. On the contrary, while it is contained in the proposition, that a majority of the votes cast in favor of the subscription to the stock of either company, should

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be considered its adoption by the people, it is also further contained and declared, 'that the said subscription shall not be made to either of said companies, unless the vote shall be carried in favor of each and all of them.'

"We cannot regard this in any other view than as an attempt to impose a condition upon the taking effect of the vote of the people adopting a proposition submitted to them, wholly unauthorized by the law. They were entitled to have the question of the county taking stock in either of these railroad companies submitted to their decision, unincumbered by any such condition or proviso. To make the success of any one proposition depend upon the adoption of all, was to take from the expression of the will of a majority of the people that essential validity intended by the law to be imparted to it."

The above decisions are very much in point, and greatly strengthen and support the views expressed by us. We regard the reasoning as wise and sound, and that the conclusions reached are in accordance with the theory and genius of our form of government.

There was much discussion, at the argument, as to the true rule of construction which should be applied to the act under consideration. The one party contended that the act should receive a strict construction, while the other insisted upon a liberal construction. There is in the State of New York a statute very similar to ours, differing only in matters of detail. The Court of Appeals in that state recently laid down the rules of construction that should be applied to such laws, which meet with our hearty approval.

In *The People v. Smith*, 45 N. Y. 772, the court say: "The power sought to be delegated to a portion of the taxable inhabitants of a municipality to burden and charge the property of all, and subject it to taxation for a purpose foreign to those for which local governments are organized, and with a view to contingent benefits, in respect to which men may differ in opinion, and in aid of works which in most instances will more largely benefit some than other

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portions of the district, alike and equally charged, is one of grave importance, seriously affecting the rights and pecuniary interests of the citizen, and can only be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the act conferring the authority. Nothing can be taken by implication, and the act, as it imposes a burden upon the public, and in a manner deprives the owner of the full control and disposition of his property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property."

It is again said by the court: "While it is for the legislature to decide upon the wisdom and expediency of the enactment of a law, and the province of the court is simply to interpret the act and give it effect according to the intent of the legislature, a statute in derogation of common right will not be extended by implication, but its operation and effect will be confined to cases within the express language employed, giving it its ordinary signification, in the absence of any evidence that the legislature intended to use it in a different sense."

We are very clearly of the opinion that the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

S. Claypool, for appellants.

J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellee.

ROSE ET AL. v. HURLEY.

WARRANTY.—Fraud.—A transaction cannot be characterized as a warranty and a fraud at the same time.

SAME.—Contract.—Tort.—A warranty rests upon contract; while fraud or

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fraudulent representations have no element of contract in them, but are essentially a tort.

SAME.—*Parol Evidence*.—If a suit is founded on a warranty in the sale of a patent right, then the contract of warranty must be in the deed by which the law requires these rights to be transferred; and if it does not so appear in the deed, it cannot be shown by parol.

FRAUDULENT REPRESENTATIONS.—The purchaser of a patent right may rely upon the representations of the seller as to what is covered by the patent.

SAME.—If there is no patent for a part of that which is exhibited by the seller to the buyer as an invention, there is fraud.

PLEADING.—*Answer*.—*Fraud*.—*Rescission*.—In a suit upon a promissory note given for a patent right, where the maker of the note defends on the ground of fraud in the sale of the patent, where the right has been conveyed to the maker, and he does not allege in his answer that he has made no profits out of its use or sale, or an offer to reconvey the right within a reasonable time after discovering the fraud, the answer is bad.

ESTOPPEL.—Where the maker of a promissory note is inquired of by a person proposing to take an assignment of the note, as to the validity thereof, and answers that he has no defence against it, he is estopped from setting up any defence against such person or his assignee.

APPEAL from the Bartholomew Common Pleas.

DOWNEY, J.—Suit by the appellee against the appellants on a promissory note executed by the defendants to one Matthias Gates, indorsed by him to one Moses Marring, and indorsed by Marring to the plaintiff.

The defendants answered, first, that the note was given in consideration of the sale by the payee of the right to make, use, and vend a certain alleged improvement in churns, for which letters patent had been issued to one David Gates, which consists of a radiated dash and tube connected therewith, and was so patented; and they say that said alleged patented invention, to wit, the said radiated dash and tube connected therewith, are not new or useful, nor an improvement in churns, and are wholly worthless.

Second. That said note was given in consideration of the sale by said Gates of the right to make, use, and vend a certain alleged patent improvement in churns, for which letters patent had been issued to one David Gates; and they say that said Matthias Gates had no right or authority whatever to make, use, or vend, or transfer to others any right

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whatever to make, use, or vend said pretended invention, and that said note is therefore without any consideration whatever.

Third. That said note was given in sole consideration of the sale by said Matthias Gates of the right to make, use, and vend a certain improvement in churns, to wit, in the dash radiated and the use of a tube to keep the dash in place, for which letters patent had been issued to one David Gates; and to induce defendants to execute said note, and whereby they were so induced, said Matthias falsely and fraudulently represented and warranted that said invention was new and useful, whereas, in truth, the same was not new and useful, but wholly worthless.

Fourth. That said note was given in consideration of the sale of the right to make, use, and vend an alleged improvement in churns, patented by one David Gates; and they say that said patent and specifications do not describe the churn in use so that it can be known in what the improvement consists.

Fifth. That said note was given in consideration of the sale and conveyance of a certain right to make, use, and vend a pretended improvement in churns, for which said Matthias Gates represented that letters patent had been issued to one David Gates; and to induce said defendants to make said purchase and give said note, and whereby they were so induced, said Matthias Gates then presented to defendants a certain model churn, which he falsely and fraudulently represented and warranted was the thing patented as an entire improvement, when in truth said patent was only upon a very small part thereof, to wit, on the dash and mode of fastening said churn to the frame on which it stood; and defendants say that they had no knowledge of the contents of said letters patent, or what was conveyed thereby, but relied on said representations. The part so patented does not at all add to the value of said churn, but is indeed an injury thereto. All of which facts were well

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known to said Matthias, and his representations aforesaid were false and fraudulent.

The plaintiff demurred to the paragraphs of the answer separately, because they did not state facts sufficient to constitute a defence to the action. The demurrs were overruled as to the first, second, third, and fourth, and sustained as to the fifth. Exceptions were taken.

The plaintiff replied to all the paragraphs of the answer; first, the general denial; and, second, that the payee of said note, prior to the ownership thereof by the plaintiff, in a short time after the execution thereof, proposed to sell the same to one Moses Marring, who, before he did or would purchase the same, saw said defendants, and informed them of said proposition by said Gates, and of his intention to purchase the same; and said defendants then and there informed the said Moses Marring that said note was all right, that they intended to pay the same when it became due, and that they had no defence thereto; and said Moses Marring, relying on said representations of said defendants, and believing said note to be all right, did thereafter, in good faith, purchase said note and pay full value therefor, not knowing of any defence thereto; and said Moses Marring thereafter indorsed said note to this plaintiff, who paid full value therefor in good faith, without any notice of any defence thereto; wherefore defendants are estopped.

The defendant demurred to the second paragraph of the reply; his demurrer was overruled, and he excepted. There were two other paragraphs of the reply, but they were withdrawn.

The issues were tried by a jury, and there was a verdict for the plaintiff, on which, after a motion for a new trial had been made and overruled, final judgment was rendered.

The overruling of the demurrs of the defendant to the third and fourth paragraphs of the reply, and the refusal to grant a new trial, are assigned for error; but we need not consider these points, for the reasons that the third and fourth paragraphs of the reply were withdrawn, as we have

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seen, and the evidence is not in the record, nor is any question relating to the regularity of the trial presented.

The only questions properly presented are those relating to the correctness of the rulings of the court in sustaining the demurrer to the fifth paragraph of the answer and in overruling the demurrer to the second paragraph of the reply.

The fifth paragraph of the answer, whatever authority may be found for it, is a kind of pleading which tends to confusion of ideas and consequent error. The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law-writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous. If there is a breach of warranty, it cannot be said that the warranty was fraudulent, with any more propriety than any other contract can be said to have been fraudulent, because there has been a breach of it. On the other hand, to speak of a false representation as a contract or warranty, or as tending to prove a contract or warranty, is a perversion of language and of correct ideas. The language of the paragraph in question is that the payee of the note "fraudulently represented and warranted," etc. We cannot tell, from this language, whether the pleader means to put the defence on the ground of contract or of tort. If it was designed to be put on the ground of contract or warranty, then the contract or warranty should have been in the deed by which the law requires these rights to be transferred; and if it did not appear in the deed, it could not be shown by parol. *McClure v. Jeffrey*, 8 Ind. 79.

If it was intended to be in tort for a fraudulent representation, it should have been a misrepresentation with reference to a material matter upon which the defendants had a right to rely, and upon which they did rely, the truth with reference to which was unknown to them. If in consequence of such a misrepresentation they made the contract,

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this would amount to fraud. Losing sight, for the present, of what is said in the fifth paragraph about a warranty, the allegation is, that the note was given for the right to make, use, and vend a pretended patent in churns, for which said Matthias Gates represented that letters patent had been issued to one David Gates; and that, to induce the defendants to make the purchase and give the note, and whereby they were so induced, said Matthias Gates then presented to the defendants a certain model churn, which he falsely and fraudulently represented was the thing patented as an entire improvement, when in truth said patent was only upon the dash and the mode of fastening the churn to the frame on which it stood; that the defendant had no knowledge of the contents of the letters patent, or what was conveyed thereby, but relied upon said representations; that the part so patented did not add to the value of the churn, but was an injury thereto, etc.

Had the defendants a right to rely upon a representation as to what was contained in the letters patent? It is alleged that the payee of the note knew their contents, and that the defendants did not. The payee was not the patentee, nor does it appear that he had possession of the original letters patent or a copy thereof, or how he knew their contents. They are of record at Washington, and were, for anything that appears, equally accessible to both parties. But the defendants took and acted upon the statements of the payee of the note with reference to their contents. Had they a right to do so?

It has been decided by this court that a misrepresentation with reference to the legal effect of an instrument executed by one of the parties to the other, is not a misrepresentation upon which fraud can be predicated. *Clem v. The Newcastle, etc., Railroad Co.*, 9 Ind. 488.

In the case of *Mead v. Bunn*, 32 N. Y. 275, the question arose whether a misrepresentation by one party to the other of the contents of a recorded mortgage constituted fraud or not; and it was held that it did, and that the omission of a

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party to make inquiries as to the truth of such statements could not be imputed to him as negligence. We conclude that the purchasers of the patent had a right to rely upon the representations made to them by the payee of the note, as to what was covered by the patent. If there had been no patent, and if it had been represented that there was a patent, we think it would be a fraud. If there was no patent for a part of that which was exhibited as the invention, we think the rule would be the same. But it is insisted that the paragraph is bad, for the reason that it does not show when the defendants discovered the fraud, and that they then rescinded the contract. We are of the opinion that the paragraph was bad for this reason. A party who would rescind a contract on the ground of fraud must offer to do so in a reasonable time after discovering the fraud, and the general rule is that the parties must be placed in the identical situation in which they were on entering into the contract. *Gatling v. Newell*, 9 Ind. 572. The defendants received a conveyance of the patent right, and they do not allege that they made no profits out of its use or sale; nor do they offer to reconvey the right. We think for these reasons it was not error to sustain the demurrer to the paragraph of the answer in question.

The only other question in the case relates to the sufficiency of the second paragraph of the reply, setting up the estoppel. It proceeds on the ground that the defendants cannot honestly set up the defence on which they rely. We think that this paragraph of the reply was sufficient. It is in substance the same as the pleadings setting up a similar state of facts in the following cases in this court: *Rose v. Teeple*, 16 Ind. 37; *Wright v. Allen*, 16 Ind. 284; *Powers v. Talbott*, 11 Ind. 1; *Rose v. Wallace*, 11 Ind. 112. Other cases to the same effect might be cited. There is no error in the record.

The judgment is affirmed, with costs.

R. Hill and G. W. Richardson, for appellants.

F. T. Hord, for appellee.

Fitzgerald v. Cox et al.

FITZGERALD v. COX ET AL.

WITNESS.—Note Assigned by Administrator.—In an action by an assignee of the administratrix of an estate, on a promissory note executed to the decedent, and assigned under the statute to the plaintiff as an heir, the maker of the note is not a competent witness to prove payment of the note to the decedent.

APPEAL from the Marion Common Pleas.

BUISKIRK, C. J.—This was an action by the appellant, as assignee of Sarah W. Fitzgerald, administratrix of the estate of J. H. Fitzgerald, deceased, upon a note executed by the appellee John F. Cox, payable to the said decedent, for the sum of one hundred dollars.

There was issue, trial by jury, finding for defendants, motion for new trial made, overruled, and excepted to.

Various errors have been assigned and argued by counsel, but it will only be necessary to notice one of them, and that question arises upon the alleged error of the court in overruling the motion for a new trial. The facts are these: John F. Cox, on the 17th day of November, 1862, executed his note to John H. Fitzgerald, who has since departed this life. Sarah W. Fitzgerald administered upon the estate of said decedent. After the payment of the debts of said administration she assigned the note to the appellant, who was one of the heirs of the said decedent. The assignment was made by virtue of section 114 of the act for the settlement of decedents' estates. 2 G. & H. 518.

This action was brought upon said note by the assignee thereof. The defendant Cox pleaded payment of the note in the lifetime of the decedent. Upon the trial of the cause, the court, over the objection and exception of the appellant, permitted the appellee Cox to testify in reference to the payment of said note. This was assigned as one of the reasons for a new trial. The court erred in permitting the appellee Cox to testify as a witness. He was clearly incompetent, as was held by this court at the present term, in the case of *Peacock v. Albin*, ante, p. 25. The ruling in

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this case is based upon the decision in the above case. For this error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions for a new trial, and for further proceedings in accordance with this opinion.

A. F. Denny, for appellant.

F. E. Heller, F. T. Dye, and A. C. Harris, for appellees.

ROOT *v.* MORIARTY.

JUDGMENT.—Statute of Limitations.—A. contracted to do certain work in the improvement of a street of a city; B. was his surety on a bond for the performance of the work. Afterward, in a suit of A. against B., it was adjudged that B. should pay and satisfy all indebtedness of A. on account of said improvement.

Held, that A., to whom certain claims for labor done in making said improvement had been assigned, could maintain a suit against B. on said claims.

Held, also, that by the judgment in said suit of A. against B., the claims assigned to A. became the debts of B., and no longer the debts of A.

Held, also, that the action of A., on the claims assigned to him, against B., was upon the former judgment of A. against B., and was not, therefore, barred by the statute of limitations, although the accounts for work and labor upon which the claims were based accrued more than six years before suit.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—Suit by the appellee against the appellant. There were issues formed, a trial by the court, and finding and judgment for the plaintiff. Two errors are assigned in this court by the appellant; first, the insufficiency of the complaint; and second, the refusal of the court to grant him a new trial. The complaint is as follows:

“Patrick Moriarty complains of Deloss Root, Michael O’Conner, Thomas Shehane, John Shay, and Michael O’Conner, Jr., and says that heretofore, to wit,—, he became indebted to Michael O’Conner in the sum of fifteen dollars and seventy-five cents, to Thomas Shehane in the sum of fifteen

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dollars and fifty-two and one-half cents, to John Shay in the sum of seventeen dollars and ten cents, and to Michael O'Conner, Jr., in the sum of twenty-five dollars, for work and labor done at his request on the improvement of East street, in the city of Indianapolis, under a contract between the said Patrick Moriarty and the common council of the city of Indianapolis, on which the said Deloss Root was surety; and that thereafter, to wit, at the September term of the Marion Circuit Court, the said Moriarty brought suit against the said Deloss Root, wherein, on full hearing, it was awarded and decreed that said Deloss Root should pay and satisfy all indebtedness on account of the improvement of East street, in the said city of Indianapolis, whereby said indebtedness of said Moriarty, incurred on account of said work and labor done as above set forth, was transferred to said Deloss Root. It is then alleged that said O'Conner, Shehane, Shay, and O'Conner, Jr., for value received, transferred said claims to said plaintiff, by which said Root had become indebted to him in the several sums above set forth, all of which remain unpaid, amounting in all to seventy-three dollars and thirty-seven and one-half cents, for which the plaintiff asks judgment."

The objection urged against the complaint is thus stated in the brief of counsel for the appellant: "The complaint shows that said accounts were originally the debts of the plaintiff to the assignors, respectively, and that in a certain proceeding in the Marion Circuit Court it was decreed that the defendant should pay all the plaintiff's indebtedness of a certain class, which included said assigned accounts, and that afterward said accounts were assigned to the plaintiff. The decree of the circuit court, although it may make defendant Root liable to pay said accounts, does not release the plaintiff Moriarty therefrom. The assignors might have sued Moriarty at any time, notwithstanding said decree. This being the case, and the assignors having assigned their debts to their debtor, it, in law, operates as a release or extinguishment of the debt. The debt being released or ex-

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tinguished is no longer a cause of action against any one. The complaint in the case, then, shows that the claims sued on were, by the original creditors, assigned to their debtor, and for this reason we say that the complaint contains no sufficient cause of action."

We think that there is but one reason why this reasoning of counsel for the appellant is not conclusive, and that is, that as, by the judgment of the circuit court, Root was adjudged and required to pay these debts, they, by virtue of that judgment, as between Root and Moriarty, became the debts of Root, and no longer the debts of Moriarty. In consequence of that judgment, Root is not now at liberty, as between him and Moriarty, to say that the debts are the debts of Moriarty, and not of himself. It is by virtue of the judgment that Root is liable to pay these debts. But for that, as the contracts were made with, and the services rendered for, and at the request of, Moriarty, Root would not be bound to pay them. We think the complaint is sufficient. But it is insisted that the action was barred by the statute of limitations, which was pleaded. The action was commenced April 7th, 1868, and the work was done in 1859 or 1860. If, therefore, the action was based on the accounts for work alone, there seems no doubt but that it would be barred by the statute of limitations requiring actions in such cases to be commenced within six years after the cause of action has accrued. 2 G. & H. 156, section 210. But we think we must regard the action as founded upon the judgment, and as not, therefore, barred in six years. As we have already stated, if it was not for the judgment, there would be no obligation upon Root to pay these debts, nor any cause of action in the complaint. Again it is claimed that the action is not prosecuted in the name of the real party in interest. This position is based on the fact that there was some evidence tending to show that the claims, or some of them, were assigned to Moriarty for the purpose of enabling him to collect them merely, and not because he was to become thereby the owner of them. The

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assignors were made parties, as required by the code in such cases, to answer as to their interest in the claims. 2 G. & H. 38, sec. 6. They do not controvert the fact of the assignment, and we see no reason why, in this case, the alleged debtor, Root, should be allowed to do so.

We do not discover any error in the record for which the judgment should be reversed.

The judgment is affirmed, with costs.

V. Carter, for appellant.

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INSTRUCTIONS TO JURY.—After the argument on the trial of a cause had closed, the court said to the jury: "I have no instructions to give you. Defendant's counsel have requested me to instruct you in writing, which I am not prepared to do, having had no time to write them. If counsel require me to put my instructions in writing without giving me time to prepare them, they must do without them. You will therefore retire, in charge of your bailiff, and do what is right between the parties."

After having been out about five hours, the jury was brought into court, and they stated that they thought there was no prospect of their agreeing; whereupon the court urged them to come to some conclusion, giving some reasons why they should do so; after which they again retired, and in about two hours returned a verdict for the defendant.

Held, that it could not be said that the court did not instruct the jury.

Held, also, that the only error assigned being the overruling of a motion for a new trial, and no exceptions having been taken to the refusal or failure of the court to instruct the jury, and the evidence not being in the record, this court could not say that any other or different instructions were necessary.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This was an action for slander, brought by the appellant against the appellee. Issues were made; there was a jury trial; verdict for the defendant; motion for a new trial overruled; and final judgment rendered for the defendant.

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The only error properly assigned is the refusal to grant a new trial; and the only ground urged under this assignment is the neglect of the court to charge the jury upon the law and facts of the case, after the close of the argument, and allowing said jury to retire to consider of their verdict without any instructions from the court.

At the close of the argument, the court said to the jury: "Gentlemen, I have no instructions to give you. Defendant's counsel have requested me to instruct you in writing, which I am not prepared to do, having had no time to write them. If counsel require me to put my instructions in writing, without giving me the time to prepare them, they must do without them. You will therefore retire, in charge of your bailiff, and do what is right between the parties."

Upon which the jury retired, to consider of their verdict. After the jury had been out about four hours—being about five o'clock p. m.—the court requested the bailiff to inquire of them if there was any prospect of their agreeing soon, to which they returned the answer, "There was none;" upon which the court adjourned temporarily, until about six o'clock, when they were brought into court and were asked by the court if they had agreed, to which they answered, "No." Whereupon they were asked if there was any prospect of their agreeing, when they answered, "They thought not." The court then proceeded to make the following statement to them, viz.:

"Gentlemen, you ought to come to some conclusion. This cause has occupied a good deal of your time, and ought not to give you much trouble. If you should not agree, it would be a large expense to the county, as well as to the parties, to try it over again. If some of you would give, and others take, a little, you might come to some agreement. I shall have supper prepared for you by eight o'clock."

In about two hours afterward, the jury returned a verdict for the defendant.

It is contended by counsel for the appellant that it is the

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imperative duty of the court, even without being requested to do so, to instruct the jury, and he relies on the following part of section 324, 2 G. & H. 198: "Fifth. When the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party." We think, if it be conceded that the court should instruct the jury generally, without being requested to do so, as decided in *Welch v. Watts*, 9 Ind. 115, that there are two good reasons why the position of appellant cannot be sustained; first, that it cannot be said that the court did not instruct the jury; and, second, that the point was not reserved by any exception to the refusal or failure of the court so to instruct. The evidence is not in the record, and any further or different instructions than those given may have been unnecessary. It would hardly conduce to the fair and proper administration of justice to allow a party to take his chances for a verdict, and then, if he was unsuccessful, to claim that there should be a new trial because the court had not instructed the jury, when he neither asked it nor excepted to its not having been done. See *Murray v. The State*, 26 Ind. 141.

The judgment is affirmed, with costs.

P. Maier, for appellant.

C. Denby and D. B. Kumler, for appellee.

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STATUTE OF FRAUDS.—*Auction Sale.*—A sale by public auction is within the statute of frauds.

SAME.—*Memorandum of Clerk of Sale.*—Where a sale was made at public auction, upon a credit, and a note was to be given with security, waiving

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valuation and appraisement laws, a memorandum of the sale made by the clerk thereof, which did not state these facts, was insufficient to avoid the effect of the statute.

APPEAL from the Shelby Common Pleas.

PETTIT, J.—This suit was brought by the appellee against the appellant, and the first paragraph of the complaint is as follows:

"Alonzo Blair, administrator of the estate of Homer Palmerston, deceased, plaintiff, complains of Edward Norris, defendant, and says that heretofore, to wit, at Shelby county, Indiana, on the first day of December, A. D. 1869, the said decedent, being then and there in life, was the owner and in possession of a large quantity of wheat, then and there remaining in bins and granaries, to wit, one thousand bushels, and being such owner of a large amount of other personal property, and being desirous of selling said wheat and other personal property for the largest and best price that could be obtained therefor, he, the said decedent, did, on the said first day of December, 1869, expose to sale said wheat and other property at auction to the highest bidder, upon the following terms, to wit, on a credit of nine months from said first day of December, A. D. 1869, on all sums over five dollars, and for amounts less, cash in hand, the purchasers giving their notes with approved security, waiving valuation and appraisement laws; and which said terms of sale were fully made known at said sale to the defendant and other bidders thereat; and the plaintiff says that prior to the said sale, the decedent caused to be printed, and published, and posted up in many public places in the neighborhood of the place of said sale, a notice, which was openly and audibly read by the clerk and auctioneer to the bidders, before and at the sale, containing the terms thereof, a copy of which is herewith filed and made a part of complaint; that one William B. Elder was the clerk of such sale, and as such clerk of such sale, made a memorandum in writing thereof; and the plaintiff says that at said sale said defendant bid off and bought said bins and granaries of wheat, amounting in the

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aggregate to about one thousand dollars, at the price and sum of eighty-one cents per bushel; that at the time of said sale, said clerk thereof, William B. Elder, made a written memorandum thereof, a copy of which is filed herewith and made a part of this complaint. And the plaintiff says that afterward, to wit, on the —— day of December, 1869, the said Homer Palmerton departed this life, intestate, at said county aforesaid, and that afterward, on the 4th day of January, A. D. 1870, the plaintiff was appointed administrator of the estate of said decedent in due form of law, and is still acting as such administrator; that heretofore, to wit, on the —— day of January, A. D. 1870, he demanded of and from the said Edward Norris that said wheat, purchased as aforesaid, be measured, and the amount of his said bid be ascertained, and that he execute to the plaintiff, as such administrator, his note therefor with approved security, waiving valuation and appraisement laws, agreeable to the requirements of sale; yet he has failed and refused to do the same or any part thereof, and still refuses. Wherefore the plaintiff sues, and demands judgment as such administrator for one thousand dollars, and all other and further relief which the equity of the case demands."

Memorandum of sale:

" BOGGSTOWN, Shelby County, Ind.

"A list of names of purchasers and articles bought at public sale of Homer Palmerton, December 1st, 1869; Jerry Weakly, auctioneer; William B. Elder, clerk: One large lot of wheat, eighty-one cents per bushel, Dr. E. Norris; one lot of wheat, about fifteen bushels, seventy-eight cents per bushel, G. S. Harrell, transferred to Dr. Norris; one small lot of wheat transferred from G. S. Harrell's account to Dr. E. Norris, not measured, at eighty-one cents per bushel. Dr. E. Norris, to Alonzo Blair, administrator of the estate of Homer Palmerton, deceased, one thousand bushels of wheat at eighty-one cents per bushel—eight hundred and ten dollars."

The notice of sale referred to in, and made a part of, the

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complaint is not in the record as such, nor in any manner that we can notice it.

In what purports to be the evidence given in the cause a copy of the notice appears; but this evidence is not signed by the judge, as a bill of exceptions in all cases should be. On page fifteen of the record the judge is asked to and does sign a bill of exceptions, but the evidence is not in it. Commencing on page seventeen and extending to page twenty-five, is what purports to be the evidence given, offered, and refused; but it is not signed by the judge, and we cannot, therefore, regard it as the evidence or as forming a part of the record.

The defendant demurred to the first paragraph of the complaint; first, for want of sufficient facts; second, for non-joinder of parties defendants; third, for want of capacity of plaintiff to sue.

There is nothing in the second and third grounds of demurrer. The demurrer was overruled, and we are to determine whether the complaint contains sufficient facts. The only reason urged why it is insufficient is, that the memorandum of sale, which is a part of the complaint, does not state the terms of the sale, in this, that it does not state that the sale was on nine months' credit, by giving note with security and waiving valuation and appraisement laws. It is admitted by both parties, and we so hold, that auction sales are within the statute of frauds, and that the auctioneer and clerk are the agents of both parties.

Many authorities, or supposed authorities, have been cited on both sides, to show that the memorandum was sufficient or insufficient. We have examined all the books referred to in relation to the sufficiency or insufficiency of the memorandum. Many of the authorities referred to on both sides have no existence in fact, or cannot be found from the references given.

In 2 Kent Com. 511, the rule is stated thus: "The contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without

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having recourse to parol proof. Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent."

Browne on the Statute of Frauds, sec. 382, says: "In cases of sales, the credit stipulated is an essential term of the contract, and must appear in the memorandum." 3 Parsons Con. 13, says: "As to the question what the written agreement must contain, the general answer is, all that belongs essentially to the agreement, and more than this is not needed; nor can parol evidence be received to supply anything which is wanting in the writing, to make it the written agreement on which the parties rely." To the same effect are the following authorities: 1 Greenl. Ev., sec. 267; *Parker's Heirs v. Bodley*, 4 Bibb, 102; *Ellis v. Deadman's Heirs*, 4 Bibb, 466; *Soles v. Hickman*, 20 Pa. St. 180; *Gill v. Bicknell*, 2 Cush. 355; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28; *Morton v. Dean*, 13 Met. 385; *Davis v. Shields*, 26 Wend. 341; *M'Farrow's Appeal*, 11 Pa. St. 503; *Burke v. Haley*, 2 Gilman, 614.

In this memorandum, the terms and conditions of the sale are not named. Nothing is said of the nine months' credit, the note and security, nor of waiving valuation and appraisement laws, which in view of the above cited authorities was required; nor is any reference made to the poster or notice of sale, and it could not be used as a part of the memorandum. The demurrer for want of sufficient facts should have been sustained.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer to the first paragraph of the complaint.

B. F. Davis, B. F. Love, and R. Norris, for appellant.

K. M. Hord, J. T. Hockman, A. Blair, and G. J. Hackney, for appellee.

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MARRIED WOMAN.—*Conveyance.*—The separate deed of a married woman is void, and passes no title to her lands.

SAME.—A married woman holding real estate descended to her from a previous husband, cannot, with or without the consent of her husband, convey the real estate so held.

RENT.—*Void Contract of Purchase.*—A person who takes possession of a tract of land under a contract of purchase that is absolutely and unconditionally void, is liable for the rent of the premises.

ESTOPPEL.—A party can never be estopped by an act that is illegal and void.

VENDEE.—*Void Contract.*—*Lien.*—One who has purchased real estate from a married woman who had no power to sell or convey has no lien on the land to secure the repayment of the purchase-money; nor has he any right to retain possession until he is repaid the amount paid upon the void contract of purchase.

EQUITY.—A right in equity cannot grow out of an illegal and void transaction.

TENANT IN COMMON.—*Conveyance.*—One tenant in common, owning an undivided interest in real estate, cannot convey to a stranger a certain portion of the tract held in common, and put the purchaser in possession of the portion conveyed.

APPEAL from the Hendricks Circuit Court.

BUSKIRK, C. J.—This action was brought by Elizabeth Mattox, Susan J. Price, adults, and Richard T. Lacy, Mary A. Lacy, Lewis M. Lacy, Sarah M. Lacy, and John W. Lacy, minors, by Franklin Price, their next friend, against Jacob Highthue, to recover the rent of certain real estate. The action originated before a justice of the peace, where a judgment was rendered for the plaintiffs for twenty-four dollars and fifty cents, and from this judgment the defendant appealed to the circuit court.

In the circuit court the defendant filed an answer and cross complaint as follows:

"The defendant, Jacob Highthue, with the permission of the court, files the following answer and cross complaint in the above entitled cause, which shows that he is in the possession of the land described in plaintiffs' complaint, and was so in possession during the year 1869; that he holds said lands by purchase from the said Elizabeth Mattox, and by deed from her, dated June 19th, 1868; that at the time of said purchase and execution of said deed, the said Eliza-

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beth Mattox was in the occupancy of said land, together with all the other plaintiffs, except the said Susan J. Price, the said co-plaintiffs being children of said Elizabeth Mattox, and all being infants except the said Susan; that the said Elizabeth and her said children were the owners, as tenants in common, of a part of the east half of the northwest quarter of section nineteen, township seventeen, north of range two east, in said county and state, containing sixty acres, which land they had derived by descent from John Lacy, deceased, who was the former husband of said Elizabeth, and the father of the other plaintiffs, and who died seized and possessed of said land, and left his widow and children in the possession of said land, but without any legal title of record; that the said Elizabeth subsequently married the said Solomon Mattox, who has abandoned the said Elizabeth and her children; that in June, 1868, said Elizabeth and her infant children aforesaid were residing on and occupying the said land; that said children were in a dependent and suffering condition, being deprived of, and in great need of, the common necessities of life, and were being in part supported by charity; and that said real estate was also encumbered at the time by a lien and assessment of one hundred and ten dollars as and for benefits to be derived by the construction of a ditch and drain of the School Branch Ditching Company, a corporation legally organized, and which assessment had been legally made, and was binding upon all of said land; and the defendant says that the said Elizabeth Mattox, being so in possession of said land, and so abandoned by her husband, and her infant children aforesaid being in want, and without a legal guardian or other person to care for them or their support, and said land being encumbered as aforesaid and liable to be sold, did offer to sell to this defendant the ten acres described in said complaint, at the sum of three hundred and fifty dollars; and that this defendant, believing she had a good right to sell said land, and convey the same, and knowing nothing to the contrary, did purchase the same of the said Elizabeth, and did, by

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agreement with her, pay off said ditch assessment and lien of one hundred and ten dollars, and did pay the said Elizabeth, for the necessary use and support of herself and infant children, the sum of two hundred and forty dollars in cash, and did receive her deed therefor, a copy of which is filed herewith, under and by virtue of which he did afterward take the possession of said land, and has since hitherto held the same; all of which was done in good faith on his part, and as he believes on the part of the said Elizabeth also; but he is now informed that said parties deny his right, and dispute his title to said land, because the same was held by descent from a former husband, and at the time of said conveyance she had a second husband living, and because her children were under twenty-one years of age. Wherefore, defendant now files this, his cross complaint, and asks that his title to said real estate be declared quiet and perfect, as against all of said parties, or that the court may decree his right be subrogated to that formerly held by the ditching company aforesaid for said sum of one hundred and ten dollars, with interest; and will the court decree that he have his judgment against the said parties for his said three hundred and fifty dollars, with interest, and decree that said land be sold to satisfy the same; or will the court grant such relief to said defendant as equity would dictate in the premises; and he asks that said parties may be required to answer this, his cross complaint, before the final trial of the cause.

"L. M. CAMPBELL, Attorney."

The deed, which was made an exhibit in the cross complaint, was in the form prescribed by our statute, and was executed by Elizabeth Mattox alone.

The plaintiffs demurred separately and severally to the cross complaint. The demurers were overruled, and the plaintiffs excepted.

The plaintiffs thereupon filed the following answer and reply:

"First. The plaintiffs in the above entitled cause, for answer

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and reply to the pleading which the defendant styles his 'cross complaint and answer,' deny each and every material allegation therein contained.

"Second. The plaintiffs, for second and further answer and reply to the pleading which the defendant styles his 'cross complaint and answer,' say that the defendant took possession of, and occupied, and farmed during the year 1869, the premises for which plaintiffs claim rent, and at the time of so taking possession, was notified that he had no right to said premises, and was forbidden by the plaintiffs to take possession of and farm the same, and was further notified by them that they, the plaintiffs, were the sole owners of said premises, and entitled to the use and occupation thereof. Therefore, the plaintiffs say that the defendant should not maintain the defence set up by him.

"Third. The plaintiffs, for a third and further answer and reply to the pleading which the defendant styles his 'cross complaint and answer,' say that on the 19th day of June, 1868, the plaintiff Elizabeth Mattox executed to the defendant the deed set forth as an exhibit by him in his said 'cross complaint and answer,' for the premises for which plaintiffs claim rent; that at the time she executed said deed she was the wife of Solomon Mattox, and that said Solomon did not join with her in the execution of said deed, nor give his consent thereto; that at the time said deed was executed said Elizabeth was not authorized by the Court of Common Pleas of Hendricks county, Indiana, or by the Hendricks Circuit Court, of the State of Indiana, to sell or convey her real estate, or by any other competent authority; that Hendricks county, Indiana, is the county in which said land lies, and in which said Elizabeth was residing at the time said deed was executed; that at the time said deed was executed said Elizabeth was the owner in fee of only the undivided one-third part of the premises described in said deed, having no other right or interest in said premises; that her right and title to said premises was derived solely by inheritance from John Lacy, deceased, who was a former husband of said

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Elizabeth, and the father of the said plaintiffs, who are also the children of the said Elizabeth; that said John Lacy died intestate, leaving the plaintiffs as his only heirs; that since said deed was executed, said Elizabeth has never acquired any other or further interest in the premises named in the said deed; that the said Elizabeth has never been divorced from her said husband, Solomon Mattox, and is now living with him as his wife in Hendricks county, Indiana; that defendant claims said real estate only by said deed.

"The plaintiffs further say that defendant claims, adversely to them, to be the owner in fee of the real estate described in said deed, and that by reason of said claim, a cloud is resting upon their title to said premises. The plaintiffs allege that said Elizabeth is the owner in fee of the undivided one-third part of said premises, and that the other plaintiffs, namely, Susan J. Price, Richard F. Lacy, Mary A. Lacy, Lewis M. Lacy, Sarah M. Lacy, and John W. Lacy, are each the owner in fee of the undivided one-ninth part of said premises described in said deed, which rights were derived by inheritance from John Lacy, deceased, who died in the year 1862, and who was the former husband of said Elizabeth and the father of the other plaintiffs at the time of his death.

"Wherefore the plaintiffs ask the court to order and decree the quieting of the title of plaintiffs to said premises; and plaintiffs ask for all general and proper relief to which they are entitled in law and equity.

"CHARLES FOLEY, Att'y for Plaintiffs."

The cause was submitted to the court for trial; and at the request of the parties, the court made a special finding of the facts in the case, and the conclusions of law upon them involved, and signed and filed the same, which is as follows:

First. In 1862 John Lacy died intestate and seized in fee simple of the east half of the north-west quarter of section nineteen, in township seventeen, north of range two east, situated in Hendricks county, Indiana, leaving surviving him, as his only heirs, his widow, Elizabeth Lacy, and their six

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children, namely, Susan J. Price, Richard T. Lacy, Mary A. Lacy, Louis M. Lacy, Sarah M. Lacy, and John W. Lacy; and that the administrator of said John Lacy, deceased, sold twenty acres on the north end of said tract of land, leaving sixty acres on the south end thereof.

Second. That after the death of said John Lacy, to wit, in September, 1863, his widow, said Elizabeth, intermarried with Solomon Mattox, whose wife she now is and has been ever since said marriage.

Third. That on the 19th day of June, 1868, said Elizabeth Mattox executed to defendant a general warranty deed, purporting to be for ten acres of her undivided one-third part of said sixty-acre tract of land, without the husband of said Elizabeth Mattox, said Solomon Mattox, joining with her in said deed, for the consideration of three hundred and fifty dollars, which defendant paid said Elizabeth, both said Elizabeth and defendant acting in the utmost good faith and believing that she could alone convey the title to the real estate described in said deed.

Fourth. That in the fall of 1868, said Elizabeth put defendant in possession of ten acres of said sixty-acre tract, designating it as the part he had purchased, and which is the part for which the plaintiffs seek to recover rent; and defendant has been in possession of said ten acres ever since, the rental value thereof for the year 1869 being twenty-five dollars.

Fifth. That said children were all under twenty-one years of age at the time said deed was executed, and the time defendant took possession of said ten acres; and all of them are still under twenty-one years of age, except said Susan J., who is past that age, and is the wife of Franklin Price.

Sixth. That said Elizabeth and said children have been in possession of said sixty-acre tract, except the ten acres of which defendant has possession, ever since the death of said John Lacy in 1862.

Seventh. That said Elizabeth Mattox has never been authorized by either the court of common pleas or the circuit

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court of Hendricks county, Indiana, or by any competent authority, to convey alone any of her real estate.

Eighth. That Elizabeth Mattox has never had any right or title to any of said sixty-acre tract of land by means other than what she derived by inheritance from her former husband, said John Lacy, deceased, and defendant claims only by the deed she executed to him aforesaid.

Upon which facts the court finds and decides the conclusions of law involved to be as follows, to wit:

First. That the plaintiffs, namely, Elizabeth Mattox, Susan J. Price, Richard T. Lacy, Mary A. Lacy, Louis M. Lacy, Sarah M. Lacy, and John W. Lacy, are tenants in common by inheritance from said John Lacy, deceased, of said sixty-acre tract of land, the interest of said Elizabeth Mattox being the one-third part thereof, and the interest of each of the others being the one-ninth part thereof.

Second. That the deed executed by said Elizabeth Mattox to the defendant, above mentioned, is null and void.

Third. That the defendant is not liable to the plaintiffs, or any of them, for rent for occupying and using during the year 1869 said ten acres above mentioned.

Fourth. And that said Elizabeth Mattox is estopped from denying and disputing the right of the defendant to the possession of said ten acres of land until said sum of three hundred and fifty dollars, with interest thereon, is repaid defendant, or tendered him.

To which finding and decision of the court upon the questions of law involved, the plaintiffs severally excepted.

Judgment was rendered as follows: that the deed executed by appellant to appellee be null and void to vest in appellee any title in fee simple to the land therin described; that the title of all of the plaintiffs in this cause to said land be forever quieted, so far as any claim thereto in fee simple by appellee is concerned; that appellant is estopped from denying and disputing the right of appellee to the use and possession of said land, until the sum of three hundred and

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fifty dollars, with interest thereon, from June 19th, 1868, is repaid appellee, or tendered him; that appellee recover costs of plaintiffs.

The record in this cause presents for our consideration and determination the question of whether the decision of the court based upon the special finding of facts and the conclusions of law was correct. The appellant, by excepting to the decision of the court, concedes that the facts are correctly and fully found, but controverts the correctness of the conclusions of law. We will examine the conclusions of law in the order in which they were stated by the court below. The appellant admits that the first conclusion of law is correct, and we shall, therefore, not consider it further.

We are next to inquire whether the deed from Mrs. Mattox to the appellee was null and void. When the deed was executed Mrs. Mattox was a married woman, and she had not been authorized by any court to convey such lands without her husband joining with her. It is provided by section 6 of an act concerning real property and the alienation thereof, I G. & H. 258, that "the joint deed of the husband and the wife, shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenant therein."

It has been repeatedly held by this court that the capacity of a married woman to convey her real estate is the creature of statute law, and that to make her deed effectual the forms and solemnities prescribed by the statute must be pursued. *Davis v. Bartholomew*, 3 Ind. 485; *Woods v. Polhemus*, 8 Ind. 60; *Reese v. Cochran*, 10 Ind. 195; *Johnson v. Rockwell*, 12 Ind. 76; *Blackleach v. Harvey*, 14 Ind. 564.

It is well settled that the separate deed of a married woman is void, and passes no title to her lands.

The only interest possessed by Mrs. Mattox in the lands in controversy, was derived by inheritance from John Lacy, who was her former husband. Subsequent to the death of the said John Lacy, she intermarried with Solomon Mattox, who was her husband at the time the said deed was executed. Mrs. Mattox inherited from her first husband one-third in

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fee simple of the lands of which he died seized and possessed, and if she had remained his widow she might have sold and conveyed the portion so inherited; but when she married a second husband, her power of alienation absolutely ceased and was terminated by section 18 of our law of descent, which reads as follows: "If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." 1 G. & H. 294.

Under the section of the statute first above quoted, the deed under consideration was void, because her husband did not join with her, and under the section last quoted, it is void, because Mrs. Mattox had no power, either with or without the assent of her husband, to alienate such real estate. There can be no doubt that the deed was null and void, and passed no title or interest to the grantee. *Black-leach v. Harvey*, 14 Ind. 564; *Newby v. Hinshaw*, 22 Ind. 334; *Baxter v. Bodkin*, 25 Ind. 172; *Shumaker v. Johnson*, 35 Ind. 33.

The third conclusion of law was that the appellee was not liable to the plaintiffs, or any of them, for rent for occupying and using, during the year 1869, said ten acres of land mentioned in the deed from Mrs. Mattox to the said appellee.

We are very clearly of the opinion that the above conclusion of law was incorrect. It seems to be well settled that a person is not liable for rent, where he has taken the possession and occupied the premises under an executory or executed contract of purchase; but such rule only prevails where the contract was not absolutely null and void. In the case under consideration, Mrs. Mattox had no power to make an executory contract for the sale of said premises, or to convey any title thereto. The entire transaction was absolutely and unconditionally null and void. The parties to

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the pretended contract are to be charged with a knowledge of the law, and, consequently, it is to be presumed that the appellee took the possession and occupied the said premises with full knowledge that the entire transaction was illegal and void. But suppose the contract was not void as to Mrs. Mattox, and that she could convey her interest in said ten acres, this could not affect the rights of the other plaintiffs. Mrs. Mattox and her children held the property as tenants in common, and such interest was undivided, for there had been no partition or division of the said lands. In such a case, a tenant could not convey any certain and described portion of the land, but might convey his or her undivided interest in the entire tract, which was held in common; and if the conveyance was valid, the purchaser would be substituted to the rights of the vendor, but such conveyance would not authorize such purchaser, without a partition, to occupy and use a particular portion of the premises. Such a purchaser would only be entitled to possess and enjoy the premises in common with the other tenants. We are very clearly of the opinion that the appellee was liable for the use and occupation of said premises, and that the court erred in its third conclusion of law.

We are next to inquire and determine whether the fourth conclusion of law was correct. The court found as a matter of law, that Mrs. Mattox was estopped from denying or disputing the right of the defendant to the possession of said ten acres of land, until said sum of three hundred and fifty dollars, with interest thereon, is repaid defendant or tendered him.

In our opinion, the above conclusions of law are radically and fatally wrong. The second and fourth conclusions are inconsistent with each other. In the second, the court held that the deed was null and void; and in the fourth, the court held that Mrs. Mattox was estopped by an act that was null and void. A party can never be estopped by an act that is illegal and void. Mrs. Mattox had no power to sell and convey said ten acres, or to put the appellee in possession

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thereof. As we have seen, Mrs. Mattox held an undivided interest in said tract of land without any power of alienating the same. But if it were otherwise, we are unable to see how the appellee could hold a lien on the ten acres. If the contract had been valid, and Mrs. Mattox's deed conveyed her interest in said land, the appellee would only have an equitable lien upon her interest so conveyed. But under the facts as found by the court, the appellee has no lien upon the said ten acres for the purchase-money, nor is he entitled to retain the possession of the premises until he is repaid the amount he paid upon his void contract of purchase. The contract and deed being void, he cannot justify his possession under them. This ruling is not in conflict with that in *Jackson v. Finch*, 27 Ind. 316. That was an action to recover back from the husband, who was a party to the contract, and in whose legal custody the money was, the purchase-money; while in this, the appellee sought, and the court decreed, a lien on the separate property of Mrs. Mattox. The same statute that deprived her of the power of alienating such land, provided the modes in which she might encumber it.

Neither of these modes was adopted. An equity cannot grow out of an illegal and void transaction.

The judgment of the court below is erroneous for another reason. The court held that Mrs. Mattox was estopped to dispute the right of the appellee to retain the possession of the ten acres, but the court did not hold that the other plaintiffs were estopped, and yet it decreed that the appellee was entitled to hold the possession of land, two-thirds of which belonged to the other plaintiffs.

The court erred in its conclusions of law and its judgment, for which error the judgment must be reversed.

The court below found all the facts necessary to a complete and final determination of this cause. The court found that the rental value of the said ten acres, for the year 1869, was twenty-five dollars, and judgment should have been rendered for the plaintiffs for that sum. The other

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facts found by the court entitled the plaintiffs to have their title quieted and the cloud placed on it by the existence of said deed, and the appellee's claim of title under said deed, removed. In our opinion the "justice of the case" does not require a new trial. 2 G. & H. 276, sec. 570; *Rice v. Rice*, 6 Ind. 100; *Bell's Adm'x v. Golding*, 27 Ind. 173.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to render a judgment for the plaintiffs for twenty-five dollars, and to quiet the title of the plaintiffs to the said ten acres, and to remove any cloud that may exist thereon by reason of said deed and the claim of title thereunder.

C. Foley, for appellant.

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PRINCIPAL AND SURETY.—*Usury*.—A surety may set up the defence of usury.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—Action by the appellees against the appellants. The complaint was in three paragraphs, counting upon three several promissory notes executed by the defendants to the plaintiffs. The first was for the sum of five hundred and eighty-four dollars and fifty-five cents, dated September 1st, 1869, and payable at sixty days; the second was for the sum of two thousand seven hundred and fifteen dollars and ninety-three cents, dated July 11th, 1869, and payable at six months; the third was for the sum of three thousand two hundred and sixty-seven dollars and fifty cents, dated July 11th, 1869, and payable at six months.

The paragraphs of the complaint were in the order of the notes as above stated. Issue, trial by the court, finding and judgment for the plaintiffs.

Demurrers were sustained respectively to the sixth and seventh paragraphs of the defendants' answer, and they ex-

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cepted. These rulings, though not the first assigned for error, present the first questions arising in the record; they will, therefore, be first considered. The sixth paragraph of the answer was pleaded in part to the second paragraph of the complaint. It appears from this paragraph of the answer that on the 11th day of January, 1868, the defendants executed to the plaintiffs a promissory note for the sum of two thousand three hundred and thirty dollars and forty-eight cents, payable at six months. The note thus given has been renewed from time to time, the last renewal being the note described in the second paragraph of the complaint. The note of the 11th of January, 1868, was executed for a debt of James M. Stockton. That indebtedness arose from the loan of money by the plaintiffs to Lawrence B. Stockton and to Martin V. Stockton, at the usurious rates of twenty and twenty-four per cent. per annum, the defendant James M. Stockton being liable for the debts, having executed his notes to the plaintiffs, respectively with the said Lawrence B. and the said Martin V. Stockton. The usury is specifically set out, and the paragraph seeks to make a deduction of the amount of usury that entered into the note of January 11th, 1868, and the question is presented whether this can be done. We have no doubt that it can. The renewal of the note of January 11th, 1868, cannot defeat the defence, for the renewed notes were given for the same debt. The case stands as if the suit were upon the first note executed by the defendants. James M. Stockton must be regarded as the principal, and Joseph S. Stockton as his surety, the note being given for the debt of James M.; and whatever defence the principal can set up, can be set up by the surety. James M. Stockton, while he is principal in the note sued upon, was surety only for Lawrence B. and Martin V. Stockton. But a surety may set up the defence of usury. *Post v. Pres., etc., of The Bank of Utica*, 7 Hill, N. Y. 391; *Billington v. Wagoner*, 33 N. Y. 31. Our statute on the subject of interest seems to be conclusive of the question. It provides that "all interest exceeding the rate of ten per centum per an-

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num shall be deemed usurious and illegal, as to the excess only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant whenever it has been reserved or paid before the bringing of the suit." 3 Ind. Stat. 317, sec. 2. This statute, in the language of FRAZER, J., in the case of *Colc v. Bansmer*, 26 Ind. 94, "furnishes alike the measure of the debtor's liability, and of the usurious creditor's lawful demand." The demurrer to this paragraph should have been overruled.

The seventh paragraph of the answer, which was in principle the same as the sixth, was pleaded in part to the third paragraph of the complaint. By this paragraph, it appears that on the 11th day of January, 1868, the defendants executed to the plaintiffs a note for the sum of two thousand four hundred and fifty-four dollars and ninety-three cents; that this note was also renewed from time to time, the last renewal being the note described in the third paragraph of the complaint; that this note of January 11th, 1868, was executed for a debt of Joseph S. Stockton, and the debt originated from a loan by the plaintiffs of certain moneys to William S. Stockton at the usurious rate of twenty per cent. per annum, for which money thus loaned, with the usurious interest thereon, the defendant Joseph S. Stockton and one Richard Moore had become bound in a note, with said William S. Stockton, to the plaintiffs; that a large amount of usury entered into the note of January 11th, 1868, which the defendants seek to have deducted from the note described in the third paragraph of the complaint.

The demurrer to this paragraph of the answer should also have been overruled. This error, in respect to the pleadings, renders it unnecessary that we should pass upon questions which arose in the subsequent progress of the cause. Those questions may not again arise.

The judgment below is reversed, with costs, and the cause remanded.

F. A. Stein, F. R. Coffroth, and T. B. Ward, for appellants.
W. C. Wilson, for appellees.

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McEWEN ET AL. v. DAVIS.

BANK.—*Deposit of Money.*—When money is deposited with a banker, it is payable on demand at the bank, unless some other agreement has been made with reference to its payment.

SAME.—The banker may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing; but the banker is under no obligation to act upon such oral direction.

SAME.—By the usages of the banking business, the banker is entitled to some written evidence of the order for money upon payment thereof.

SAME.—A banker, it was held, was not bound to pay money held for one on deposit, on a note held by a third person, upon the oral request of the depositor, when it was not shown that it was proposed to surrender the note to the banker, or to give any other evidence of the payment of the money.

PLEADING.—*Complaint.*—A complaint to recover money deposited with a banker should show that some form of written evidence of payment was offered.

BANK.—*Money Deposited.*—*Depositor.*—A banker will always be justified in making payments upon the orders of the person who made the deposit, or upon orders of any person whom he designates as competent to control it, until he has notice that the ownership is claimed by somebody else, adversely to either of these parties.

SAME.—Any obligations which a bank voluntarily assumes on the strength of a depositor's ownership, as by certification of checks or otherwise, or any obligation which has been imposed upon it by operation of law, as by process of garnishment, may be secured and discharged by retention in its possession of a sufficient sum from the fund on deposit to meet and acquit the same.

APPEAL from the Bartholomew Common Pleas.

DOWNEY, J.—The only questions made in this case arise upon the pleadings. It is assigned for error by the appellants, who were the defendants in the common pleas, that that court erred in overruling the demurrer to the complaint, and also in sustaining the demurrs to the paragraphs of the answer.

The complaint was by Solomon Davis, surviving partner of the firm of Davis & Stuckey, against William McEwen, Archibald McEwen, Gideon McEwen, and Lawrence B. Stuckey, administrator of the estate of Samuel Stuckey, the deceased partner of Davis. It is alleged in the complaint that on or about the 26th of March, 1870, and to the time of the death of Stuckey, the plaintiff and said Stuckey

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were partners in the purchase and sale of horses; that on said 26th day of March, 1870, the defendants, William McEwen, Archibald McEwen, and Gideon McEwen, were and still are partners in the business of banking, keeping a bank of discount and deposit in Columbus; that on said 26th day of March, 1870, Stuckey deposited with the defendants in said bank, payable on demand, the sum of eighteen hundred dollars of funds of the firm of Stuckey & Davis; that afterward the defendants paid on the check of said Stuckey one hundred and fifty dollars, and on notes of said firm, payable at said bank, and left there for collection, eleven hundred and eighty-seven dollars and seventy cents; and are entitled to a further credit of twenty-one dollars and one cent overpaid by said defendants on account of other funds of said firm of Stuckey & Davis, deposited by the plaintiff in his own name; that there remained due and unpaid on account of said deposit, made as aforesaid by said Stuckey, the sum of four hundred and forty-one dollars and twenty-three cents, and interest; that on the —— day of April, 1870, Stuckey departed this life, intestate, and the defendant Lawrence Stuckey became administrator of his estate; that on the —— day of May, 1870, plaintiff, as surviving partner as aforesaid, with one Jesse Walker, who held and still holds a note against plaintiff and said Stuckey, partners as aforesaid, payable at said bank, for the sum of one thousand dollars, which was due, presented the same at said bank during banking hours, and plaintiff, as surviving partner aforesaid, and having at and before said time notified said defendants, the McEwens, that said funds belonged to said firm, and was partnership funds aforesaid, demanded of said defendants that said balance be applied to the payment of said note, which they utterly refused to do, and failed to pay the same, or any part of it, to the plaintiff upon his check or order, as surviving partner as aforesaid, or otherwise; and the plaintiff says the whole amount of partnership effects belonging to said firm of Stuckey & Davis will not be sufficient to pay the indebtedness of said firm to third parties; wherefore, etc.

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It is urged by counsel for the appellants that the complaint is defective, so far as it alleges a demand upon the defendants to pay the balance of the money to Walker on the note of Stuckey & Davis held by him; although Davis, the surviving partner, directed such payment to be made, for the reasons that the note was for a larger amount than the balance of the deposit, it was not offered to surrender it to the bank, nor did Davis offer to check out the balance of the deposit, or in any other way furnish the bank with evidence of the payment. It is also insisted that the other allegation in the complaint with reference to the refusal of the defendants, McEwens, to pay the money to the plaintiff, is insufficient, for the reason that, although it is alleged that they failed to pay the same, or any part thereof, to the plaintiff upon his check or order, as surviving partner as aforesaid, or otherwise, it is not alleged that the plaintiff ever made any demand of the defendants to pay the same to him by check or otherwise.

Conceding that the money of the firm of Stuckey & Davis, deposited by Stuckey in his own name, might properly be demanded by Davis, as the surviving partner, which we do concede, was he bound to draw it out on his check or furnish other written evidence of its payment, or were the bankers bound to depart from the usual and customary mode of doing such business, and pay the money on his oral order or demand? There is no allegation that Davis offered to furnish any evidence of the payment of the money by receipt or by drawing a check for the amount, when it was demanded that the same should be paid on the note held by Walker; nor is there any evidence that Davis demanded the payment of the balance of the deposit to himself, and offered to give any such evidence of payment, although it is stated that the McEwens failed to pay it on his check or order or otherwise. When money is deposited with a banker it is payable on demand, at the bank, unless some other agreement has been made with reference to its payment. The banker is not required to hunt up the depositor and pay him the money, as an ordinary debtor is bound to do with his creditor. The

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banker may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing. But though the banker may, if he choose, act upon such oral direction, he is under no obligation to do so. By the usages of the banking business he is entitled to demand some written evidence of the order and the payment. A receipt would, of course, be evidence of such payment, and so the check of the depositor will, when paid and in the hands of the banker, be evidence of the order to pay, and also of the fact of payment. Morse Banks and Banking, 29. We are of the opinion, then, that the McEwens, the bankers, were not bound to pay the money to Walker, on his note, upon the oral request of Davis.

The note was not in the bank for payment, but was in the hands of Walker. All the money in the bank to the credit of Stuckey was not sufficient to pay off the note of Walker; and it is not shown that it was proposed to surrender the note to the bankers, or to give them any other evidence of the payment of the money. As we have seen, it is not alleged that Davis ever demanded the money at the bank. As the banker is entitled to some written evidence of the payment, we think the fact that it was offered in some form should be shown in the complaint.

These views lead us to the conclusion that the complaint was insufficient, and that the demurrer to it should have been sustained. As the remaining questions may again arise in the case, we will examine the answers, with a view to the decision of the remaining questions.

In the first paragraph of the answer of the McEwens, it is alleged that on the 23d day of January, 1869, William McEwen sold to Stuckey a pair of mules, for five hundred and fifty dollars, for which Stuckey gave his promissory note to McEwen, a copy of which is filed with the complaint; that the mules were traded for two horses which were put into the pretended partnership, and the firm got the benefit of them, the same having been sold by them for seven hun-

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dred dollars, which constituted a portion of the money so deposited in said bank; that McEwen sold and transferred the note of Stuckey to the National Branch Bank of Madison, Indiana; that after said deposit, which was made in the individual name of Stuckey, Stuckey requested them to take up and pay said note, and in consideration thereof promised defendants that the same should be paid and satisfied to them out of said money then in their hands; and that, in pursuance of such request, they did take up said note with said funds, when they had no notice that said Davis had any interest in the deposit; they further allege that the amount thus paid, and the amounts paid by them as mentioned in the complaint, amounted to more than the amount of the deposit.

In the second paragraph it is stated, that Stuckey made his note to William McEwen for five hundred and fifty dollars, payable at a bank named; that McEwen sold and indorsed it to said National Branch Bank at Madison; that when the same became due, to save it from protest, Stuckey requested these defendants to pay it, and that they should be paid out of money that he would in a few days place in defendants' hands; that defendants accordingly took up the note; and that afterward Stuckey placed in defendants' hands said sum of eighteen hundred dollars, as his own private money, stating then that he had no time or he would take up said note so paid for him by defendants, and that said money should be applied to the payment of said note; that he would call in a few days and take the said deposit out; that it was the agreement that said money should be first applied to the payment of said note; that by mistake all of the said money was paid out on debts of Davis & Stuckey, at the request of said administrator of said Stuckey, except the sum of —— dollars, which was not enough to satisfy said note and interest, but that a balance would still be due to the defendants. They also allege that they had no notice of any interest of Davis in said deposit at the time the same was

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paid into their hands, and paid by them as aforesaid, but they believed the same to be the money of Stuckey.

The third paragraph is like the second, except that it alleges that the note of Stuckey was paid by the deposit of the money, it having been previously paid by the said defendants to said National Branch Bank, and taken up by them, with the agreement that it should be so paid by Stuckey, by the application to its satisfaction of a part of said deposit; that when this was done the defendants had no knowledge of any interest of Davis in said deposit. They also allege the overpayment of the deposit, as in the second paragraph.

The same author, to whose work we have already referred, says: "The bank will always be justified in making payments upon orders of the person who brought the deposit, or upon orders of any person whom he designates as competent to control it, until it has notice that the ownership is claimed by somebody else adversely to either of these parties.

* * * * * * * * *
Until the bank is notified by somebody else of an adverse claim, it will be protected in treating the fund as that of the apparent depositor. Its payments upon his orders will be valid discharges. Any obligations which it has voluntarily assumed on the strength of his ownership, as by certification of his check or otherwise, or any obligation which has been imposed upon it by operation of law, as by garnishee process, may be secured and discharged by retention in its possession of a sufficient sum from the fund to meet and acquit the same." Morse Banks and Banking, 274.

As, according to the first paragraph of the answer, Stuckey directed the payment of his note, which had been transferred to the bank at Madison, out of the money deposited, and it was accordingly paid before the McEwens, the bankers, had any notice of any interest of Davis in the money deposited, it seems to us that, according to the foregoing authority, the paragraph was good.

The second and third paragraphs differ from the first, in

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the fact that they allege that the McEwens, the bankers, had paid off for Stuckey and taken up his note at the bank at Madison before the money had been paid to them by Stuckey, but under a promise from him that they should be reimbursed out of the money when it should be so deposited; and it is alleged that a sufficient amount of it was so appropriated and applied by the McEwens, before any notice to them of any interest of Davis in the deposit.

These defences seem also to be good according to the above authority.

The judgment is reversed, with costs; and the cause is remanded.

R. Hill, G. W. Richardson, and F. T. Hord, for appellants.

S. Stansifer, for appellee.

WELLS, AUDITOR, ET AL. v. SHOEMAKER, AUDITOR OF STATE.

FEES AND SALARIES.—*Delinquent Taxes.—Construction of Statute.*—A county treasurer, under the Fee and Salary act of February 21st, 1871, it was held, could not claim any percentage for the collection of taxes on his current duplicate, which taxes had been returned delinquent, but not having been collected by the treasurer upon a precept issued to him by the county auditor for the collection of delinquent taxes, had been carried forward and placed upon the duplicate for the current year.

APPEAL from the Marion Common Pleas.

BUISKIRK, C. J.—This was an action commenced by the auditor and treasurer of Bartholomew county for a writ of mandate against the auditor of state. The complaint avers that the auditor of Bartholomew county made out his certificate, as required by the 123d section of the act providing for assessment of taxes (I G. & H. 102); and that the treasurer of said county presented said certificate to the

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auditor of state, and demanded a certificate and draft upon the treasurer of state, as required by section 6 of an act to establish a treasury system (I G. & H. 647); and that the auditor of state refused to receive such certificate of the auditor of said county, and also refused to issue a certificate and draft to the treasurer of state, because the auditor of said county had allowed the treasurer of said county nineteen dollars and fifty-four cents for collecting one thousand three hundred and eighty-eight dollars and twelve cents for delinquent taxes. The auditor of state entered his appearance, and filed an answer, in which he admitted the facts stated in the complaint, but sought to avoid them by averring that the delinquent taxes so collected by the treasurer of said county had been carried forward upon the duplicate for the current year, and collected as current taxes, and had not been collected by the said treasurer as delinquent taxes upon a precept issued to him by the county auditor for the collection of delinquent taxes.

To this answer the appellants filed a demurrer, which was by the court overruled, to which ruling an exception was taken. The appellants refusing to plead further, final judgment was rendered for the appellee. The appellants have assigned for error the overruling of the demurrer to the answer of the appellee. The precise question presented for our decision may be briefly stated thus: Can a county treasurer, under the fee and salary act of February 21st, 1871, claim any percentage for the collection of taxes on his current duplicate, which taxes had theretofore been returned delinquent, but, not having been collected by the treasurer upon a precept issued to him by the county auditor, for the collection of delinquent taxes, had been carried forward and placed upon the duplicate for the current year?

The twenty-ninth section of the fee and salary act, after fixing the salary of county treasurers, closes with these words: "And shall have in addition the fees and commissions now allowed by law for the collection of delinquent taxes." Acts 1871, p. 38.

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It is upon the above quoted words that the appellants base their right to charge the fees in question. We think it very clear that these words do not refer to any taxes placed on the current year's duplicate, but only to taxes collected by the treasurer as delinquent taxes upon the precept issued by the county auditor for the collection of the delinquent taxes, and where the same is collected by virtue of such precept, by the voluntary payment thereof or by the distress and sale of the delinquent tax-payers' property. The delinquent taxes which the treasurer fails to collect on such precept are carried forward and placed upon the duplicate for the current year, and are, during the time the treasurer holds that duplicate, collected as current taxes are collected, and the treasurer has no right to charge for the collection as though he had collected such taxes upon the precept for the collection of delinquent taxes. Section 78, I G. & H. 94, defines clearly just what the current duplicate shall contain, while sections 103 and 104, I G. & H. 98, clearly show that taxes, for the collection of which the treasurer can claim on the ground that they are delinquent, are not, and cannot be, taxes collected on the current duplicate, and collected as current taxes are collected.

The case of *The Board of Commissioners of Grant County v. Miles*, 21 Ind. 438, is clearly in point, and is decisive of the case under consideration. In that case it was directly decided that the treasurer was only entitled to charge the five per cent. and constable's fees for taxes collected as delinquent, when the same were collected upon the precept issued to him by the auditor; and that when such delinquent taxes are not collected on such precept, they are carried forward and placed upon the duplicate for the current year, and are to be collected and paid for as current taxes.

We do not deem it necessary to go into a careful and critical examination and comparison of the various sections of the act for the assessment and collection of taxes, for this was done with great accuracy and completeness in the above case. It is to be presumed that section 29 of the fee.

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and salary act was framed and passed in view of the construction which had been placed upon the law in the above decision.

Prior to the passage of the recent fee and salary act, the compensation of county treasurers consisted of commissions upon the amount of taxes collected on the current duplicate, and for delinquent taxes collected upon the precept issued by the auditor for the collection of delinquent taxes; but by the above act they are to receive a fixed salary, and all commissions and fees are taken away, except those allowed by law for the collection of delinquent taxes. It surely was not intended by the legislature to give the treasurer, in addition to his salary, a commission on delinquent taxes which had not been collected on a precept, but had been carried forward and placed upon the current duplicate. The treasurer would have as much right, in justice, to demand and receive a commission on the other taxes on the duplicate as on the taxes which had been returned delinquent, but, not having been collected on a precept, had been carried forward and placed on the duplicate; for the collection of the delinquent taxes occasions no more expense or labor than the collection of the other taxes on the duplicate. But the collection of delinquent taxes on a precept imposes additional labor and expense upon the treasurer; for he is required to call upon, in person or by deputy, every delinquent tax-payer in the county and demand the payment of such delinquent taxes; and upon a failure to pay on demand, he is required, by distress and sale of the goods and chattels of such delinquent tax-payers, to make such taxes, with ten per centum damages and costs. After a levy has been made, the treasurer has to give ten days' public notice of the time and place of the sale, by advertisements posted up in at least three public places in the township where such sale shall be made. At the time and place named in the notice of sale, the treasurer is required to attend and sell enough of the property levied on, at public auction, to make said taxes, damages, and costs.

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For these services the treasurer is allowed five per cent. on the amount collected, and the same fees and charges as are allowed by law to constables for making levy and sale of property on execution. See Acts of Special Session of 1861, p. 94. The legislature, in doing away with the commissions heretofore allowed treasurers, very wisely continued in force the law which gave them compensation for collecting delinquent taxes on a precept. The obvious purpose of the legislature was to secure the prompt collection of delinquent taxes, and this purpose would be defeated if county treasurers have the right, when they have failed and neglected to discharge their plain duty to collect the delinquent taxes on a precept, to have them carried forward and placed upon the duplicate, and when thus collected to charge and receive a commission thereon. It is our duty to carry into full effect the legislative will, and not to defeat it.

The court below committed no error in overruling the demurrer to the answer.

The judgment is affirmed, with costs.

J. W. Nichol and L. Jordan, for appellants.

J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellee.

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JONES ET AL. *v. SCHULMEYER.*

CITY.—*Street Improvement.—Lien.*—The cost of a street improvement made by order of the common council of a city is not a lien upon the real estate liable to assessment, until the estimate has been made; and the lien does not relate back to the time when the work was commenced.

EVIDENCE.—Parol evidence is not admissible to show that at the time of the execution of a deed of conveyance of real estate, and of a mortgage thereof by the vendee to secure unpaid purchase-money, the vendor agreed to pay for street improvements then in progress, and for which the real estate would be liable to assessment; and especially is such evidence inadmissible where the

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mortgage contained an agreement on the part of the mortgagor to keep all legal taxes and charges against the real estate paid as the same became due.

MORTGAGE.—Contract.—Where a mortgage is made to secure the payment of a series of notes, it is competent for the mortgagor to agree to pay attorneys' fees, and that on failure to pay one of the notes, all the notes shall become due and payable.

SAME.—Married Woman.—A married woman may bind herself, by her mortgage, in such a contract..

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellants to foreclose a mortgage of July 23d, 1870, on certain real estate in the city of Indianapolis, given to secure the payment of seven promissory notes, executed for purchase-money. The mortgage contained a stipulation that on failure to pay any one of the notes when due, or within sixty days thereafter, all of them should be due and collectible; and a failure to pay the first note of two hundred dollars was alleged, in consequence of which it was claimed that the notes were all due.

The defendants answered as follows:

First. They admit the execution of the notes and mortgage, and that they were given for the purchase-money of the real estate mentioned in the mortgage, which real estate they allege the plaintiff conveyed and warranted to the defendant Orissa M. Jones, by deed of July 23d, 1870; that on the 12th day of April, 1870, the common council of the city passed an ordinance, a copy of which is filed with the answer, for the improvement of New Jersey street; that the contract was let on the 12th day of April, 1870; that the mortgaged premises are situated on that part of said street to be improved; that at the time of the conveyance of said real estate a part of the work under said contract was done, and a part of the street in front of said property had been graded and bouldered under the contract; that on the 12th day of September, 1870, an assessment of one hundred dollars and ninety-one cents was by the common council made against said premises for said grading and bouldering. Wherefore they say that at the time of said conveyance

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said premises were incumbered to that amount, and which amount the said Orissa M. Jones paid on the 23d day of September, 1870. They further alleged a tender of the balance of the matured note, which was for two hundred dollars, and brought the money into court.

Second. After admitting the execution of the notes and mortgage, and that they were given for the balance of the purchase-money of said real estate, they say that the plaintiff conveyed and warranted said real estate to the defendant Orissa M. Jones, on the 23d day of July, 1870; and that at the time of said conveyance it was agreed and understood by and between the agent of plaintiff, who sold said premises to defendants, that there were at that time street improvements in front of said property in progress; and that said plaintiff by his agent agreed and undertook at that time to pay for all of said street improvements that might be assessed against said property; and defendants expressly aver that said agreement was a part of the inducement and consideration for the purchase of the said property by the defendant Orissa M. Jones; and that on the 12th day of September, 1870, an assessment was made against said property by the common council of one hundred dollars and ninety-one cents, on account of said improvement in front thereof, which the plaintiff refused to pay, and which the defendant Orissa M. Jones paid on the 23d day of September, 1870. They further allege a tender of the residue of said matured note, and bring the money into court.

Third. Admitting as before, they say that on the 23d day of July, 1870, the plaintiff conveyed and warranted to the defendant Orissa M. Jones the said real estate; that at the time of the execution of said deed and mortgage, the agent of the plaintiff represented to the defendants that said street improvements were paid for, and that the defendants would not be compelled to pay for the same; that such representation was part of the inducement and consideration for the purchase of said real estate; that they relied on the same; that they were false and fraudulent, in this, that said improve-

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ments were not paid for; and that the said mortgage would not have been delivered but for such representation. They further allege the making of the assessment for one hundred dollars and ninety-one cents, and the payment thereof by the defendant Orissa M. Jones, and also a tender of the residue of the amount of the matured note on the day on which it fell due, and that they bring the same into court.

Fourth. In the fourth paragraph, they admit the execution of the notes and mortgage, alleging that they were given for balance of purchase-money, and say that the plaintiff by his warranty deed, a copy of which is filed with the answer, on, etc., conveyed and warranted said real estate to the defendant Orissa M. Jones, and thereby warranted that said real estate was free of all incumbrances; and defendants further say, that at the time of delivering said deed to the defendant Orissa M. Jones, the defendants delivered the notes and mortgage sued on to the agent of the plaintiff, who sold the real estate to the defendant Orissa M., and who represented to the defendants that there were street improvements in front of said premises in progress, and that said improvements were paid for, and the defendants would not be compelled to pay for the same; that they relied on said representations, and they were a part of the inducements and consideration for the purchase by the defendant Orissa M. Jones of the said real estate; that said representations were false and fraudulent, and were made with the intent to deceive the defendants, and did deceive them; that said improvements had not been paid for, but afterward an assessment was made therefor by the city council, in the sum of one hundred dollars and ninety-one cents, which was paid by the defendant Orissa M.; wherefore they say that the consideration of said note to that extent has failed. They allege a tender of the residue of the matured note, when it became due, which they paid into court with the answer.

The plaintiff demurred to each of the paragraphs of the answer separately, and his demurrers were sustained to the

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first and second, and overruled as to the third and fourth. Exceptions were taken.

The plaintiff then replied to the third and fourth paragraphs of the answer by general denial.

There was a trial by jury, and a verdict for the plaintiff, and answers to interrogatories, as follows:

First. Was Myers the agent of the plaintiff for the sale of the property described in the mortgage to the defendants? if so, when did he become so? Answer. No.

Second. Did Myers, as agent of plaintiff, represent to the defendants, at the time of the sale of said property, and before and at the time of the delivery of the deed and mortgage to and on the same, that there were, at that time, street improvements in front of said property in progress, and that said improvements were, at that time, to wit, the time of said sale and delivery aforesaid, paid for, and that these defendants would not be compelled to pay for the same? Answer. Yes, but was not agent.

Third. If said agent made the representations, and at the time, designated in the first preceding interrogatory, did said defendants rely on said representations, and were they a part of the inducement for the purchase of said property by the defendant Orissa M. Jones? Answer. Yes.

Fourth. If the representations set forth in the second interrogatory were made by said agent, were they false? if yea, in what were they false? Answer. Yes, in not being paid.

Fifth. When was the estimate made for the street improvements in front of the property in the mortgage described? Answer. September 12th, 1870.

Sixth. Did the defendant Orissa M. Jones pay said estimate on said property? if so, when and how much did she pay? Answer. Yes, September 12th, 1870, one hundred dollars and ninety-one cents.

Seventh. Did the defendant Orissa M. Jones tender to the plaintiff, before the bringing of this suit, in the legal tender money of the United States, the amount due on the

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note for two hundred dollars, now due and sued on, before the sixty days of grace ran out, less the amount paid by her in discharge of the lien on said property for said street improvements? Answer. Yes.

Eighth. If such tender was made, was it accompanied by any condition upon which the money was to be received by plaintiff? Answer. Yes.

Ninth. Did the plaintiff refuse the tender made by the defendant Orissa M. Jones before bringing suit, and before the sixty days of grace ran out? if yea, upon what ground did he so refuse? Answer. Yes, that he was not liable for the improvements.

The defendants moved the court for a new trial, for the following reasons:

First. That the verdict of the jury was contrary to law.

Second. The verdict of the jury was contrary to the evidence.

Third. The damages assessed by the jury were excessive.

Fourth. That the court erred in permitting incompetent and immaterial evidence, offered by the plaintiff, to go to the jury during the trial of the cause, over the objection of the defendants.

Fifth. That the court erred in giving instructions numbered two, four, five, six, and seven to the jury, to which defendants at the time excepted.

Sixth. That the court erred in refusing to give instructions numbered one, four, and seven, asked by the defendants, to which the defendants at the time excepted.

This motion was overruled, and the defendants excepted.

The defendants then filed objections in writing to the rendition of the judgment, which were as follows:

First. It provides for the sale of the property to satisfy the said decree.

Second. That it provides for the sale of the whole of the property to satisfy the whole of the mortgage debt, without making any provision that in case one of the instalments now due is satisfied, and the costs of suit paid, the other in-

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stalments shall be stayed, and become due and collectible only as they become due, as stipulated in the notes and mortgage.

Third. Because the defendant Orissa M. Jones is not bound by any of the covenants in the mortgage foreclosed, and is therefore not bound by the covenants that provide for attorney's fees, and that all the instalments shall become due on failure to pay any one of them.

This objection was also overruled, and the defendants again excepted. Final judgment was then rendered for the plaintiff.

Several points are made in the assignment of errors, but they all resolve themselves into three; first, the sustaining of the demurrers to the first and second paragraphs of the answer; second, the overruling of the motion for a new trial; and, third, the rendition of judgment for the sale of the whole mortgaged premises.

The first question in order is as to the sufficiency of the first paragraph of the answer. The legal question involved here is this: "Does the cost of an improvement of a street, after the passage of the ordinance, resolution, or order for the improvement, and after the letting of the contract and part of the work has been done, but before any estimate has been made, constitute a lien on the real estate, and cause a breach of the covenant against incumbrances, or any other covenant, in a general warranty deed?"

Section 70 of the general law relating to cities, 3 Ind. Stat. 100, provides for the making of the estimates for street improvements, and declares that "such estimate shall be a lien upon the ground upon which they are assessed, to the same extent that taxes are a lien, and shall have the same preferences over other demands." It is contended by counsel for the appellants that when the estimate has been made, it relates back to the time when the work was commenced. We are not of this opinion. It is the estimate which becomes a lien, and not the mere order for the work, the contract, or the doing of the work, or all of them com-

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bined. But for the statute there would be no lien. As the estimate was not made in this case until two months after the deed was made, according to the allegations of the paragraph in question, it was not an incumbrance on the real estate when it was conveyed, nor any breach of the covenants in the deed. *Langsdale v. Nicklaus*, 38 Ind. 289.

Next, as to the sufficiency of the second paragraph of the answer. The question here is, whether it can be averred and proved by parol that at the time the deed and notes and mortgage were executed, it was agreed by the vendor that he would pay for the improvements. To allow this, would be not only to add to the stipulations of the parties in the deed and notes and mortgage by parol, but would, in this case, be in flat contradiction of an express provision in the mortgage, which is as follows: "And it is further expressly agreed that until all of said notes are paid, said mortgagors will keep all legal taxes and charges against said premises paid as the same become due," etc. This cannot be done.

There was no error in sustaining the demurrer to this paragraph of the answer.

We are next to examine the reasons which were assigned for a new trial.

No point is presented for our consideration under the first reason assigned for a new trial, that is, that the verdict was contrary to law.

In considering the next point, that is, the insufficiency of the evidence to sustain the verdict, it is proper that we should see what facts or questions in the case were found by the jury for the defendants, and what against them. The jury found in favor of the defendants by their answers to the interrogatories:

First. That Myers represented to the defendants, at the time of the sale of the property, and before and at the time of the delivery of the deed and mortgage, that there were, at that time, street improvements in front of said property in progress, and that said improvements were, at that time, to wit, the time of said sale and delivery, paid for, and that

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the defendants would not be compelled to pay for the same.

Second. That the defendants relied upon said representations, and they were part of the inducement to the purchase of the property.

Fourth. That these representations were false, because the street improvements had not been paid for.

Fifth. That an estimate was made on September 12th, 1870.

Sixth. That Mrs. Jones paid the estimate, amounting to one hundred dollars and ninety-one cents, September 12th, 1870.

Seventh. That she tendered to the plaintiff the balance of the matured note before the commencement of the action, in legal tender money of the United States, before the expiration of the sixty days' grace allowed by the contract.

Eighth. That the plaintiff refused the tender.

The jury found against the defendants, in the answers to the interrogatories, that Myers was not the agent of the plaintiff. We think that the defence set up in the third and fourth paragraphs was made out if Myers was the agent of the plaintiff. We will recur to the evidence then on this point, assuming, as we ought to do, that the representations were made by Myers, and see if he was the plaintiff's agent,

Without setting forth the testimony at length, it appears that in 1868, Copeland was a real estate agent in Indianapolis, and the property was left in his hands by the plaintiff for sale. Afterward, and before the sale of the property, Myers became a partner with Copeland in the same business. The defendants went to them to examine and purchase property. Copeland told Myers to show them all the property they had for sale in the north-east part of the city. When Myers came back, Copeland said Myers asked him whose property this was, and he told him it was the plaintiff's property, and went and introduced Myers to the plaintiff as his partner. Then the plaintiff, Copeland, and Myers went to see the defendants, and acting upon the representations of Myers, previously made to them, the defendants made a proposition in writing to purchase, which the plaintiff ac-

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cepted, and which was followed by the deed and mortgage. We presume the jury found that Myers was not an agent of the plaintiff, for the reason that he was not a partner of Copeland when the real estate was left in the hands of Copeland for sale. We think this view of the question was incorrect. We infer, and the jury should have found, from the fact of Myers' being a partner of Copeland, from his acting in the matter under the direction of Copeland, from his being introduced to the plaintiff by Copeland as his partner, and from the fact that Myers and Copeland went together with the plaintiff to the defendants, when it was made known to the plaintiff that Myers had carried on the negotiation with the defendants, and from the fact that he assisted in closing up the trade, that he was the agent of the plaintiff.

But if Myers was a mere assistant of Copeland, acting for him, and we should regard Copeland as the only agent of the plaintiff, it would be difficult to see how we could do otherwise than to consider the representations as having been, in effect, made by Copeland, and then in that view, as the third and fourth paragraphs of the answer do not name the agent, the defence would have been made out. Under the circumstances we are not quite willing to say that the plaintiff shall have the advantage of the bargain negotiated for him by Myers, and not also be responsible for his representations. The case, in this view of it, appeals to us pretty strongly in favor of the defendants.

We will not examine the instructions, as what we have already decided disposes of most, if not all, of them.

We think there was no error in the rendition of the judgment, if right in other respects, for the amount of all of the notes. It was competent for the parties to agree to pay the attorneys' fees, and that on failure of the defendants to pay one of the notes, all the notes should become due and payable. We think the *feme covert* might bind herself by her mortgage in such a contract. *Philbrooks v. McEwen*, 29 Ind. 347.

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The judgment is reversed, with costs, and the cause remanded with instructions to the court to set aside the verdict and grant a new trial.

G. W. Spahr and H. Dailey, for appellants.
W. Wallace, for appellee.

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JUSTICE OF THE PEACE.—*Appeal.*—In proceedings commenced before a justice of the peace, to condemn lands for the right of way of a turnpike, though the record does not show which party appealed to the circuit court, or that any appeal was taken, yet, if a transcript of the proceedings before the justice, and the papers in the case were filed in the circuit court, and the parties appeared therein and proceeded as if an appeal had been taken, the cause may be regarded as having been regularly appealed, or any error in that respect may be considered waived.

PRACTICE.—*Turnpike.—Proceedings to Condemn Lands.*—In the absence of proof showing that the line of a road, for which lands are sought to be condemned, is a departure from the line contemplated by the articles of association of the turnpike company that instituted the proceedings, it is not error to overrule a motion to dismiss the proceedings on the grounds of such departure.

Query, whether such objection can be taken by motion.

SAME.—*Where the complaint by a turnpike company, to condemn lands for her road, states that the road has been located,* the question of location cannot be tried on a motion to dismiss because the road has not been located.

SAME.—*Viewers.*—Under the statute (1 G. & H. 475, sec. 7), in a proceeding before a justice to condemn lands for the use of a road, as well as on appeal, three viewers are to be appointed, who are to be sworn as jurors to assess the damages.

SAME.—*Where three viewers were in such a case appointed by the justice, without any objection from the owner of the land sought to be condemned, and on appeal to the circuit court, three other viewers were appointed, the owner only making a general objection to the appointment of viewers, and not claiming a jury of twelve;*

Held, that the right of trial by a jury of twelve was waived, even if the owner otherwise had that right; and that after the coming in of a report by viewers appointed by the court on appeal, it was too late to demand a jury.

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SAME.—*Report of Viewers.*—A report made by a majority of the viewers appointed to assess damages for lands sought to be condemned is sufficient.

SAME.—*Motion to Set Aside Report of Viewers.*—A motion to set aside a report of viewers in such case, on the grounds that they have deducted supposed benefits and failed to consider important injuries, where no proof is offered in support thereof, is rightly overruled.

COSTS.—*Supreme Court.*—Where no question is made in the court below in reference to costs, it cannot be successfully raised for the first time in the Supreme Court.

APPEAL from the Shelby Circuit Court.

WORDEN, J.—This was a proceeding by the appellee against the appellant to condemn certain lands of the appellant for the right of way for the appellee's turnpike road. The proceedings were instituted before a justice of the peace, before whom three viewers were appointed to assess the appellant's damages, who made their return, and the justice rendered judgment accordingly. The clerk of the court below states that the cause was appealed to the circuit court, but the record does not show which party appealed, nor, indeed, that any appeal was taken. A transcript, however, of the proceedings before the justice was filed in the circuit court, together with the papers in the cause, and the parties appeared in the circuit court and proceeded in the cause as if an appeal had been regularly taken. We think the cause may be regarded as having been regularly appealed, or that any irregularity in that respect was waived.

The complaint alleges, amongst other things, that the appellee is a corporation organized under the act of May 12th, 1852, authorizing the construction of plank, etc., roads, and the amendments thereto, "for the purpose of constructing, owning, and maintaining a certain gravel turnpike road, commencing at Brandywine creek where the Bluff Road crosses said creek, and to run on and along what is called and known as the Bluff Road, by way of Boggstown, to the Red Mills, on Sugar creek, in the county of Shelby, or as near thereto as may be deemed most advisable." * * * * "That said road is located and runs on and over the portions hereinafter described of the following described tract of land owned by

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said Thomas Beynon, situate in Shelby county, Indiana, to wit: The south half of the west half of the south-east quarter of section No. twenty-eight (28), township thirteen (13), north of range six (6) east; and on and over the following described portions of the tract of land above described, to wit: a piece of land ten (10) feet in width along the north line of the county road, running east and west, on the line between the southern boundary of said tract and the tract of land adjoining the same on the south side thereof, extending from the south-east corner of said tract of land west to the part of the bluff on the west side of Brandywine creek, a distance of eighty (80) rods, more or less; said public county road now located thereon being thirty (30) feet in width, half thereof, to wit, fifteen (15) feet in width for the distance above named being located on the tract of land above described, along and adjoining the south boundary thereof. And also on a piece of land fifty (50) feet in width, extending from the point last above named, to wit, from the foot of said bluff on the west side of said Brandywine creek, northward along the foot of said bluff through said tract of land, and adjoining the said bluff to the northern boundary of said tract of land."

In the circuit court, the appellant moved to dismiss and set aside the proceedings, for the following reasons, as stated in the abstract of counsel for appellant, viz.: "first, that the route over which the appellee sought to condemn appellant's land was not on the line or route of the road as described in the appellee's articles of association, but more than thirty rods therefrom; second, that when the proceedings were commenced, the appellee had not made any location of the line or route other than that described in the articles of association; no change of location had been made; third, that at the commencement of this proceeding the company had not located its line of road; fourth, that the route through appellant's land is not the route fixed in the articles of association, and that it does not appear that a change of location was necessary because of hills or other obstacles, and that

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only three persons were called to assess damages, whilst the law required twelve."

This motion was overruled, and the appellant excepted. On motion of the appellee the court appointed three viewers to assess the appellant's damages, to wit, Lewis Ricketts, Thomas H. Fleming, and Lewis Fessenbeck. To this the appellant objected, but he does not seem to have pointed out any ground of objection, nor did he then claim a jury of twelve men instead of three. Overruled and exception.

The three viewers proceeded to an examination of the premises, and two of them made the following report, viz.:

"The undersigned, Thomas H. Fleming and Lewis Ricketts, two of the viewers appointed by the Shelby Circuit Court at the present term thereof, to assess the damages to the lands described in the complaint in this proceeding, sustained by the said Thomas Beynon, in consequence of the construction of the said road through his lands, did, on the 6th inst., proceed to view the said tract of land, and after having taken into consideration the disadvantages the construction of said road will be to the same, do find and assess his damages at the sum of two hundred dollars."

Lewis Fessenbeck made a similar report, but assessing appellant's damages at six hundred dollars.

The appellant moved to reject the report for the reasons, as shown by the abstract, "first, that the viewers did not agree; second, that two viewers found one sum and one other viewer another sum; third, that the two viewers who found but two hundred dollars deducted supposed benefits to appellant from his damages; fourth, that the two viewers who found two hundred dollars failed to take into consideration important injuries to appellant, such as making and maintaining lines of fences."

For these reasons the appellant asked that the report be set aside, and that he be allowed a trial by jury. Overruled and exception.

The appellant moved for a new trial, and filed reasons therefor, which are unnecessary to be stated in detail, as we

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are unable to see that any question arises upon them, no evidence being in the record, and no error of law being alleged to have occurred on the trial. Judgment was rendered in accordance with the report of the two viewers.

The errors assigned are as follows: first, the court erred in overruling the appellant's motion to dismiss the proceedings; second, the court erred in appointing reviewers to assess the damages; third, the court erred in overruling appellant's motion to set aside the appointment of reviewers and their report; fourth, the court erred in overruling appellant's motion for a new trial; fifth, the court erred in confirming report of reviewers; sixth, the court erred in its order appropriating the appellant's property to the use of the appellee; seventh, the court erred in rendering judgment against appellant for costs in circuit court; eighth, the court erred in refusing the appellant a jury trial; ninth, the court erred in rendering judgment as set out in the record.

Some of the members of the court have doubts whether an appeal lies to this court in such cases, notwithstanding the case of *Piper v. The Connerville, etc., Turnpike Co.*, 12 Ind. 400. But as this question is not made by counsel in the cause, and as the judgment must be affirmed, whereby substantially the same result will be reached as if the appeal were to be dismissed as not lying to this court, we have concluded not to pass upon that question.

We find no error in the record.

The first assignment of error brings in question the ruling of the court below in overruling the motion to dismiss the proceedings. The first and fourth grounds of the motion go upon the assumption that the line of the road, as sought to be established through the appellant's land was a departure from the line contemplated by the appellee's articles of association. The articles of association were not, nor need they have been, made a part of the record; nor were they offered in evidence; nor was any evidence offered in support of the motion.

Comparing the line of the contemplated road as described

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in the complaint, and the line running through the appellant's land, we cannot say that the latter is a substantial departure from the former. There being no proof before the court of such departure, it was not error to overrule the motion on that point, even if the objection could be taken on motion. The point made in the fourth ground of the motion, that three only, instead of twelve persons, were called, in the proceedings before the justice, to assess the appellant's damages, will be noticed hereafter. The second and third grounds of the motion controvert the fact that the line of the road had been located. It was averred in the complaint that it had been located, and we do not think the question could be tried on motion. We pass to the second assignment of error, viz., that the court erred in appointing reviewers to assess the damages. This was done in accordance with the provisions of the statute on the subject. I G. & H. 475, sec. 7. In proceedings before justices to condemn lands in such cases, as well as on appeal, three persons are to be appointed as viewers, who are to be sworn as jurors, to assess the damages of the party whose property is to be appropriated. Conceding that the party whose land is to be appropriated is entitled to have the damages assessed by a jury of twelve men, still it is a right which he may waive.

See the case in 12 Ind., *supra*. It is a principle of our law, as a matter of practice, that a failure to assert a right at the proper time is a waiver of the right. In this case, the viewers were appointed by the justice without objection from the appellant, he having been duly summoned. In the circuit court the appellant objected to the appointment of viewers, but pointed out no objection, nor did he then claim a jury of twelve. This objection had no more force than if no objection had been made. If the appellant had desired to have had the cause tried by a jury of twelve men, instead of three, he should have said so, and in that case the court could have acted understandingly in the matter. We are clearly of the opinion that the course pursued by the appellant was a waiver of the right of trial by a jury of twelve,

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if he otherwise had that right. There was no error in the appointment of three viewers by the court, under the circumstances.

The third assignment of error relates to the overruling of the motion to set aside the report of the viewers. The first and second objections to the report are based upon the fact that the viewers were not harmonious in their views of the damages; but the report of the majority was sufficient, and the court rightly acted upon it. *Piper v. The Connerville, etc., Turnpike Company, supra.* The third and fourth objections to the report assume that the two viewers deducted supposed benefits, and failed to take into consideration important injuries; there was, however, no proof offered of these facts, and in the absence of such proof the court rightly overruled the objection. The matters alleged were not to be taken as true simply because they were stated as grounds of the motion. It may be here added that upon the coming in of the report of the viewers, appointed as before stated, it was too late for the appellant to demand a trial by a jury of twelve.

The fourth assignment of error raises no question not otherwise considered.

In relation to the fifth and sixth assignments, we may observe that we see no error either in confirming the report of the viewers or making the proper order appropriating the appellant's property.

The seventh assignment of error relates to costs in the court below. No question was made in the court below in this respect, and it cannot be successfully raised for the first time in this court.

What we have already said sufficiently disposes of the eighth and ninth assignments of error.

The judgment below is affirmed, with costs.

O. J. Glessner, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

E. H. Davis, C. Wright, B. F. Davis, and B. F. Love, for appellee.

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PLEADING.—*Counter Claim.—Evidence.*—When a counter claim is pleaded, the reply thereto ends the pleading. If there is any new matter which might have been pleaded to the reply under the former practice, it may now be given in evidence without further pleading.

SAME.—*Practice.—Error.*—Where a pleading is filed, which the party filing it has no right to file, a ruling upon a demurrer to such pleading is immaterial, and cannot be assigned for error.

PARTIES.—*Agreement in Open Court.*—An agreement about a cause pending, made in open court and entered upon the minutes of court, is binding, and a party cannot be allowed to violate such agreement, upon which the court and adverse party have acted.

PRACTICE.—*Special Finding.—Judgment.—Assignment of Error.*—Where a special finding of facts and conclusions of law is made by the court, if the pleadings are sufficient, and the facts are found as alleged, the proper judgment is an inevitable conclusion or consequence; and an assignment of error in rendering a decree under the evidence and the findings of the court presents no question for review.

SAME.—The proper mode in which to reserve questions with reference to such conclusions of law is by excepting to them, and not by a motion to set them aside. Assigning error of law in the legal conclusions is no cause for a new trial.

SAME.—*Pleadings Filed in Vacation.*—There is no law to prevent a defendant from filing an answer, or amended or additional answer, in vacation, when the other party has not completed the issues by reply.

APPEAL from the Tippecanoe Circuit Court.

DOWNEY, J.—In 1838, the appellant, by written contract, sold to William Bennett, the ancestor of the appellees, certain real estate, and put him in possession thereof. William Bennett paid a considerable part of the purchase-money; the time for the payment of the residue thereof was extended by a subsequent agreement; but Bennett died without having made full payment for the land. The appellant, by bill in chancery, proceeded to subject the land to the payment of the residue of the purchase-money, making the widow and heirs of the deceased parties thereto. In 1845, he obtained a decree, ascertaining the amount due to him, and directing the sale of the land for the payment thereof; and at the sheriff's sale he became the purchaser thereof for less

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than the amount due him, and took possession of the land. The heirs appealed from that judgment or decree to this court, and the decree was reversed. See *Bennett v. Welch*, 15 Ind. 332, for the facts in full. When the cause was remanded to the circuit court, the heirs filed a counter claim, in which they set forth the facts at length, and insisted upon a specific performance of the contract by Welch. On the interposition of a demurrer, it was held by the circuit court that the counter claim did not make a case for specific performance, and judgment was rendered accordingly. From this judgment the appellees again appealed to this court, and this judgment was also reversed. See the case reported in 25 Ind. 140.

On the return of the case to the circuit court, issues were made upon the counter claim.

The trial of the cause was then submitted to the court, by agreement of the parties, the Hon. A. L. OSBORN acting as judge, on account of a change of venue which had been taken from the regular judge, the cause having been set down for a hearing before him on a day in vacation. After hearing the evidence, by consent of the parties the court ordered that the cause be continued until the next term, and that at any time during the next term, or during any subsequent term of the court, the same judge should make any and all orders and entries, including his findings and rulings and the judgment thereon, and other necessary orders, subject to all just exceptions then to be taken. At the succeeding regular term of the court, Judge OSBORN did not attend, and the cause was continued by the regular judge until the next term. At that term, Judge OSBORN appeared, when Welch objected to his proceeding to decide the cause or taking any further steps therein, because there had been no continuance of the cause by him from the special term. This objection was overruled, and the appellant excepted by proper bill of exceptions. The judge then made a special finding and declared his conclusions of law, which finding is not signed by the judge, but is in the record, and referred

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to in the bill of exceptions in these words: "Upon which evidence the court made the findings which elsewhere in the record of this case appear, to which said findings and each thereof the defendant, Welch, at the time excepted." The special findings and conclusions of law and the exceptions are as follows:

"That the said defendant, Turner Welch, did on the eleventh day of June, 1838, sell to the said William Bennett the said real estate in the said complaint and amended complaints mentioned; and on that day the said contract mentioned in said complaints, of that date, was executed by said defendant, Welch, and Bennett, and by said Jacob D. Mustard and Samuel Mustard as the sureties of said Bennett; and that the land mentioned in said contract is the same land mentioned in said complaints; that on the twenty-fifth day of December, 1838, the said Bennett paid to said defendant, Welch, the sum of three thousand dollars, as stipulated in said contract for him to do; that said defendant, Welch, did not make or tender to said Bennett a deed for said land or any part of it; that said Bennett did not make and tender to said Welch any mortgage upon said lands to secure the deferred payments, and no demand was made by either of said parties upon the other for such deed or mortgage; that afterward, on the first day of July, 1841, the said Bennett and Welch executed the contract in said complaint mentioned of that date, and that Thornton W. Sargeant executed said contract as the surety of said Bennett; that after the first payment of the said sum of three thousand dollars, said Bennett, in his lifetime, paid to said Welch the sum of one thousand one hundred and ninety-two dollars and fifty cents, as follows, to wit: January, 18th, 1840, four hundred dollars; July, 23d, 1840, one hundred and ten dollars; November 13th, 1840, one hundred and eighty-two dollars and fifty cents; September, 1841, five hundred dollars; that said Bennett died intestate, in March, 1842, leaving surviving as his heirs, and only heirs at law, the said Samuel T. Bennett, Louisa J. Talbott, and William S. Bennett; that said Louisa

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has since intermarried with said Samuel; that said heirs were then infants under the age of twenty-one years; that said William Bennett took possession of said lands immediately after the execution of and under the first said contract, and so continued in possession until his death; that on the thirteenth day of April, 1844, said Welch filed his bill in chancery in this court against said heirs, and such proceedings were had therein that on the thirteenth day of March, 1845, a decree was rendered that such real estate should be sold to pay the amount then found due said Welch as the balance of the purchase-money for said lands; that afterward, on the eighth day of November, 1845, all of said real estate situate in the county of Tippecanoe was sold and conveyed by the sheriff of said Tippecanoe county under said decree to said defendant, Welch; that on the twentieth day of December, 1859, said decree was reversed by the judgment of the Supreme Court of this State; that said Welch took possession of said real estate so purchased under said decree on the first day of March, 1846, and has remained in possession of and enjoyed the rents and profits of the same ever since; that said rents and profits have been of the annual value of seven hundred and twenty dollars, commencing March 1st, 1846, and ending March 1st, 1867; that said Welch after he took possession of said real estate, and during the year 1846, made lasting, valuable, and necessary repairs thereon, of the value of two thousand dollars, and that the same are now of that value to the said real estate; that said Welch has paid taxes legally assessed on said lands in Tippecanoe county, as follows, to wit: 1846, twenty-one dollars and sixty-five cents; 1847, twenty-five dollars and sixty-three cents; 1848, twenty-six dollars and ninety-five cents; 1849, twenty-five dollars and thirty-six cents; 1850, twenty-eight dollars and thirty-one cents; 1851, forty dollars and thirty-three cents; 1852, forty dollars and twenty-eight cents; 1853, thirty-nine dollars and ninety cents; 1854, forty-six dollars and fifty-two cents; 1855, sixty-two dollars and eighty-one cents; 1856,

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fifty-nine dollars and ninety-eight cents; 1857, eighty dollars and eighty-four cents; 1858, forty-three dollars and eighteen cents; 1859, eighty-two dollars and thirty-four cents; 1860, sixty-four dollars and twenty-two cents; 1861, one hundred dollars and eighty-six cents; 1862, ninety-seven dollars and ninety-eight cents; 1863, one hundred and thirteen dollars and thirty-two cents; 1864, one hundred and ninety dollars and thirty-one cents; 1865, three hundred and eighty-eight dollars and fifty cents; and in Fountain county nine dollars per year, for each year from 1847 to 1865, inclusive; that after the death of the said William Bennett and after the said sheriff's sale, the administrator of the estate paid to said Welch the sum of three hundred and thirteen dollars and nine cents. And the court further finds that after the death of said Willliam Bennett, the said heirs left said real estate, and the same was taken possession of by the administrator of the estate of said William, and that he received the rents and profits thereof until said Welch took possession on the first of March, 1846, and the same became assets of said estate in his hands; that said estate was insolvent and settled as such; that said Welch received the sum of three hundred and thirteen dollars and nine cents, as his distributive share of the assets of said estate on the sum then remaining unpaid of the purchase-money for said real estate after crediting the same with the amount of his said purchase on said decree; that the rents and profits of said real estate, from the time said William Bennett took possession of the same until the time of his death and from that time until said Welch took possession thereof, was of the annual value of four hundred and eighty dollars; that when said repairs were made by said Welch, said heirs were in the state of Ohio and had no personal knowledge of the same; that they were then infants, the oldest being five years of age, and the youngest being one or two years of age; and the court find, as a conclusion of law upon the facts, as follows:

“First, that the said Welch is accountable to said heirs for the rents and profits of said real estate during all the time

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that he has enjoyed the same as above found, after deducting the said amounts paid for taxes, to which said Welch now excepts.

"Second, that said defendant, Welch, is entitled to be credited with the amount of the value of said repairs, with interest thereon from the first day of March, 1847, to which the plaintiffs except.

"Third, that said heirs are not accountable to said Welch for any rents and profits for the use of said lands by said William Bennett, or by themselves, or by the said administrator, to which said Welch excepts. And the court, after taking an account between the parties on the basis aforesaid, find that there is due to the said Welch the sum of sixteen hundred and thirty-one dollars and nine cents.

"And the court further find that there would be due the said heirs the sum of five thousand and fourteen dollars and seventy-three cents, if said Welch was not allowed for said repairs; which is excepted to by said Welch.

"And the court further find as a conclusion of law that upon the payment of said sum of one thousand six hundred and thirty-one dollars and nine cents by the said heirs to the said Welch, or into the clerk's office of this court for his use, and the assumption of their own costs herein, they are entitled to a deed of conveyance from said Welch for said real estate vesting the title thereof in said heirs in fee simple; which is excepted to by said Welch."

The appellant moved the court for a new trial, for the reasons, that the finding was contrary to the evidence, and because of the errors of law in the legal conclusions set forth in the special findings. This motion was overruled by the court. The court having found that there was due Welch on the purchase-money, after settling the accounts for rent against him, and for taxes and improvements in his favor, the sum of sixteen hundred and thirty-one dollars and nine cents, the appellees paid that sum into court and agreed to pay their own costs; the court thereupon adjudged specific performance of the contract in their favor, and appointed a

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commissioner, who conveyed the title to them. The evidence is set out in a bill of exceptions, and the question made relating to its sufficiency is properly reserved.

The following errors are assigned by the appellant in this court:

First. The overruling of the appellant's demurrer to the counter claim.

Second. Overruling appellant's demurrer to appellees' reply to appellant's answer.

Third. Sustaining the appellees' motion to strike out portions of appellant's answer, as stated in the abstract herewith filed.

Fourth. In assuming jurisdiction to decide said case and render a final decree therein.

Fifth. In refusing to grant a new trial.

Sixth. In the legal conclusions from the findings of the court.

Seventh. In overruling appellant's motion to set aside the decree.

Eighth. In rendering a decree for specific performance under the evidence and its own findings.

Ninth. In overruling appellant's several motions to reject the appellees' counter claim.

Tenth. In overruling appellant's motion to set aside first, third, and last conclusions of law, specified in the findings of the court.

Eleventh. In overruling appellant's motion to set aside the second conclusion of law, specified in the findings of the court.

Twelfth. In its findings in the first, second, third, and last conclusions of law.

So far as any of the questions presented to us have been already decided by this court, we shall not disturb them. We have examined them so far as to satisfy ourselves that there is no sufficient reason for overruling what has already been decided.

When the case was last in this court, and decided as reported in 25 Ind., *supra*, it was held that the facts set forth

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in the counter claim were sufficient, if true, to entitle the appellees to the specific performance of the contract. This, then, disposes of the first assignment of errors now made.

The next error relates to the action of the court with reference to a pleading which the party had no right to file. A counter claim is properly set up in the answer. 2 G. & H. 83, sec. 56, third division. When a counter claim is pleaded, the reply thereto ends the pleading. 2 G. & H. 68, sec. 48. If there is any new matter which might have been pleaded to the reply under the former practice, it may be given in evidence without further pleading. 2 G. & H. 100, sec. 74, and p. 195, section 318. In this case, the reply to the counter claim is denominated in the record an answer, and then the appellant filed another pleading, which is styled a reply. The second assignment of errors relates to the overruling of a demurrer to the last named pleading. It was not material what the court did with that pleading; its action cannot be successfully assigned for error.

It was only a repetition of what had been stated in the counter claim, and did not change the material facts from what they were in the previous pleadings. It should, had a motion been made, have been stricken out by the court. A demurrer to it did not, however, perform the office of a motion to strike it out.

The next question relates to the action of the court in striking out certain facts of the reply, but improperly spoken of in the assignment of errors as the answer. Upon as careful an examination of the facts of that pleading thus set aside as we have been able to make, we have come to the conclusion that the matter thus stricken out was irrelevant and immaterial, and that it was properly stricken out and set aside. We do not deem it necessary to set out the parts of the pleading stricken out in this opinion.

- It is scarcely admissible for the appellant to object to the authority of Judge OSBORN to sit in the case, and finally dispose of it at the time of such final disposition. It would be to allow the appellant to violate an agreement made and

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entered of record in open court, and upon which the court and his adversary had acted. But for this agreement, Judge OSBORN would, no doubt, have adjourned the special term until some time when he could have attended and made a final disposition of the cause. To allow the appellant to repudiate the agreement, and urge the objection of want of power in the judge to hold the court, would conduce neither to the proper administration of justice, nor to fair and commendable practice. The agreement made and entered upon the minutes of the court was binding upon the appellant. 2 G. & H. 328, sec. 772. There was no error in this action of the court.

Passing over the fifth assignment of errors, for the present, the sixth is based on alleged error in the conclusions of law by the court upon the findings of fact. As we have seen the special finding was not signed by the judge, and instead of having been incorporated in the bill of exceptions, it is only referred to as being elsewhere in the record. According to the bill of exceptions, the appellant excepted to the findings, and not to the conclusions of law. The exception should be to the conclusions of law. 2 G. & H. 207, sec. 341. See *Peoria Marine, etc., Co. v. Walser*, 22 Ind. 73. Without deciding that the special findings and conclusions of law and the exceptions are properly in the record, or the exceptions properly taken, we have examined the conclusions of law, as if the findings, etc., were properly in the record, and the exceptions properly made, and see no error in such conclusions of law.

There is no reason shown for setting aside the decree, or judgment, and we do not see that any question is presented by this assignment.

The eighth assignment attempts to call in question the action of the court in rendering the decree or judgment; but when the pleadings are sufficient, and the facts are found as alleged, the proper judgment is an inevitable conclusion or consequence, which cannot be avoided or arrested, except by showing that the pleadings do not assert the necessary

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facts, or that the facts so alleged are not really true. This assignment questions neither the law nor the facts of the case, and raises no question which we can decide.

The motions to reject the counter claim were properly overruled. When the first judgment was reversed by this court, and the cause remanded to the circuit court, there was no answer on file, none having been filed by any of the defendants, except that the usual answer of the infants by their guardian *ad litem* was filed. It seems to us that it was proper that the appellees should then file their counter claim, setting up the facts upon which they relied for specific performance of the contract. It was, doubtless, with this view that the case was brought to this court, that they might get rid of the judgment and the sale of the land by the sheriff on the judgment to Welch. The counter claim having been filed in vacation, without any permission from the court, it was proper to test the question of the right to have it on file by a motion to reject it. We know of no law to prevent a defendant from filing his answer or an amended or additional answer in vacation, when the other party has not completed the issue by a reply to the answer. 2 G. & H. 117, sec. 97. As the court might unquestionably have allowed the counter claim to have been filed, as it was filed, and the court refused to set aside the pleading, we ought not, we think, to reverse the judgment on account of this action of the court.

10th, 11th, and 12th. These assignments of error relate to the overruling of the motions to set aside the conclusions of law. The proper mode in which to reserve questions with reference to the conclusions of law is by excepting to them. A motion to set them aside is unknown to correct practice.

The fifth assignment of error is the refusal of the court to grant a new trial, and, as we have seen, the new trial was asked for the reason that the finding was contrary to the evidence. The other reason assigned for a new trial,

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that is, "errors of law in the legal conclusions," is no reason for a new trial. It does not relate to the facts, and, therefore, cannot be considered as a reason for again examining the facts of the case. Was the evidence sufficient? The evidence on the part of the appellees established the facts set forth in the counter claim, and there was nothing in the evidence, we think, which materially changed these essential facts of the case. Unless, therefore, we were prepared to say that the opinion or judgment of the court in 25 Ind. was erroneous and should be overruled, we must regard the evidence in this case as sufficient to sustain the claim for specific performance. We concede that the case has some elements of apparent hardship. But we cannot see that any one is more chargeable with this result than the appellant himself. He did not rescind or abandon the contract, or treat it as having been rescinded or abandoned by the appellees. On the contrary, he treated the contract as still open, subsisting, and in full force, when he instituted this action by the filing of his bill in chancery for its enforcement, which resulted in the sale of the land and his purchase of it. When that decree was rendered, the land sold, and he had by its purchase again acquired all that he had parted with, he was not content, but still prosecuted his claim for the balance due against the estate of Bennett, and really collected and received from that source a considerable amount of money. It is not possible for us to say, in view of these circumstances, that he regarded or treated the contract as rescinded or abandoned. Not until some time after the judgment or claim under which he had purchased and was holding the land had been reversed, and until after he had taken steps with a view to a further prosecution of his suit, did he discover that the contract was at an end, and that the appellees had no right to specific performance. It is held in 25 Ind., *supra*, that under the facts as stated in the counter claim, and as they appear in evidence now, as we have said, the case was one for specific performance; and

Johnson v. Kilgore.

following that decision, we must hold that the evidence warranted the judgment of the court.

We have thus examined all the assignments of error, and are of the opinion that there is no error in the record.

The judgment is affirmed, with costs.*

Z. Baird, F. A. Stein, F. R. Coffroth, T. B. Ward, F. E. McDonald, F. M. Butler, and E. M. McDonald, for appellant.

R. C. Gregory, R. Jones, F. S. Pettit, and S. A. Huff, for appellees.

* Petition for a rehearing overruled.

JOHNSON v. KILGORE.

PLEADING.—Complaint.—An allegation in a complaint, that “the defendant is indebted to the plaintiff,” is sufficient to show that the debt is due and unpaid.

APPEAL from the Grant Common Pleas.

DOWNEY, J.—Complaint by the appellee against the appellant, as follows: “Joseph Kilgore complains of Jesse Johnson, defendant, and says that said defendant is indebted to him in the sum of six hundred dollars for work done and labor performed and materials furnished, a bill of particulars of which is filed herewith. Wherefore plaintiff demands judgment for seven hundred dollars and other proper relief.” It has the proper caption, is signed by counsel, and accompanied with a bill of particulars.

The only question presented to this court is as to the sufficiency of the complaint. It is objected that it is bad, because it does not aver that the debt is due and unpaid. Both of these, we presume, are embraced in the allegation that “the defendant is indebted to the plaintiff.” The complaint is substantially according to the form published in the statute, 2 G. & H. 376, No. 11, and these forms are expressly declared to be sufficient. 2 G. & H. 373, sec. 1.

Toliver *v.* Moody.

The judgment is affirmed, with ten per cent. damages and costs.

J. Brownlee and H. Brownlee, for appellant.

I. Van Devanter and J. F. McDowell, for appellee.

THE CITY OF WASHINGTON *v.* KAUFFMAN.

APPEAL from the Daviess Circuit Court.

PETTIT, J.—This case was submitted Nov. 27th, 1871. There is no assignment, or attempted assignment, of error on the transcript, as required by sec. 568, 2 G. & H. 275, and by rule first of this court.

The appeal is dismissed, at the costs of the appellant.

W. D. Bynum, for appellant.

J. R. Mitchell, for appellee.

TOLIVER *v.* MOODY.

MOTION FOR NEW TRIAL.—*Misconduct of Jury*.—Alleged misconduct of the jury, consisting of statements made by one or two jurors in the jury room, that the defendant is “a wealthy man,” if any reason for a new trial, is not sufficiently sustained by the oath of the defendant that he had been informed and believed that such statements had been made in the jury room.

APPEAL from the Lawrence Circuit Court.

DOWNEY, J.—This was an action for slander brought by the appellee against the appellant. A complaint consisting of three paragraphs was filed, and is set out in the transcript. Separate demurrers were filed to each paragraph, which were overruled. The defendant then answered by general denial. Subsequently the defendant moved the court to strike out certain parts of the complaint, and his motion was

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sustained. The plaintiff was given leave to amend the complaint. The defendant again demurred to the complaint, and his demurrer was overruled. The defendant then again answered. Neither the amended complaint, the demurrer to it, nor the last answer is in the record.

The overruling of the demurrs to the paragraphs of the complaint is assigned as error. But as neither the amended complaint nor the demurrs to it are in the record, we cannot decide whether the action of the court was correct or not.

The only other error assigned is, that the court should have granted a new trial. The new trial was asked on the ground, first, that the evidence is not sufficient to sustain the verdict; second, that the verdict is contrary to law; third, that the damages are excessive; fourth, certain misconduct of the jury, consisting in an alleged statement by one or more of the jurors to their fellows in the jury room, that the defendant was "a wealthy man," which was untrue.

The slanderous words were spoken to the plaintiff and to others, at different times, at a public sale, where there were a hundred or more persons present. The damages were fourteen hundred dollars. We cannot disturb the judgment on account of the insufficiency of the evidence, or the amount of the damages. The slander was that the plaintiff had been guilty of larceny. The charge of misconduct on the part of the jurors, if it was any reason for a new trial, is not sustained by any evidence. The defendant made oath that he had been informed and believed that such statement had been made in the jury room. This was no evidence upon which to set aside the verdict. We see no reason for reversing the judgment.

The judgment is affirmed, with costs.*

BUSKIRK, C. J., having been of counsel for the appellee, was absent.

E. D. Pearson, A. B. Carlton, and F. H. Swaar, for appellant.

*Petition for a rehearing overruled.

O'Halloran v. Leachey.

O'HALLORAN v. LEACHEY.

MECHANIC'S LIEN.—Remedy.—The remedy provided by section 649 of the code, for sub-contractors, journeymen, and laborers, employed in the construction or repair of a building, or furnishing materials therefor, is purely personal, while the remedy provided by section 650 is *in rem*.

SAME.—Notice.—Under said section 649, the notice need not describe the premises; and a party is entitled to pursue the remedy provided by that section, although he may also have taken the steps necessary to create a lien on the premises.

SAME.—Notice.—Description of Premises.—In a notice of intention to hold a mechanic's lien, the premises were described as "a certain building, three-story high, with the lower story finished off with a stone front, situated on the eighteen feet on the east side of town lot number fifty-eight, in Washington, formerly called Liverpool, in said county" (the county having previously been named in the notice).

Held, that the description was sufficient.

APPEAL from the Daviess Common Pleas.

BUSKIRK, C. J.—The only question presented by the record is, whether the court erred in sustaining a demurrer to the complaint. The complaint was as follows:

"John O'Halloran, plaintiff, complains of Mary Leachey, defendant, and for an amended complaint herein, says that said defendant is indebted to him in the sum of sixty dollars, being the balance due on stone and stone work used by one — Lincoln, in and about the erection of the two story brick building, with a stone front in the lower story, situated on the east corner of lot numbered fifty-eight (58), in that part of the town of Washington, in Daviess county, Indiana, formerly called Liverpool, lately built and erected for the said defendant by the said — Lincoln, who was the contractor for the erection of said building, and at whose special instance and request and for whom the stone and stone work aforesaid were furnished by the plaintiff. The plaintiff further says that, on or about the 1st day of September, 1870, he caused a notice (a copy of which is filed herewith and marked A) to be served on the said defendant, by which the defendant was duly notified of the nature and amount of the plaintiff's claim, that said claim was due and unpaid, that

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it was plaintiff's intention to hold the defendant, as the owner of said building, responsible for the payment of the amount so due him, as aforesaid. Wherefore the defendant was, and became, and still is, liable to pay the plaintiff for the amount of his said debt.

"And the plaintiff further says, that afterward, to wit, on the 15th day of October, 1870, and within sixty days after the completion of the said building, he caused to be filed and recorded, on the proper record in the recorder's office of said county, a notice of his intention to hold a lien upon said premises for said sum of sixty dollars, which said notice is hereto attached, and marked B, and made a part hereof.

"Wherefore the plaintiff says that he has acquired a lien on said premises, and that said premises are subject and liable for the payment of his said debt. Plaintiff, therefore, demands judgment against the said defendant for the sum of sixty dollars, and an order that the said premises be sold for the satisfaction of said debt, and other proper relief."

The notices made a part of the complaint were as follows:

"EXHIBIT A.

"To Miss MARY LEACHEY:—You are notified that — Lincoln is indebted to me in the sum of sixty dollars, being for balance due me on contract for stone and stone work used by said Lincoln in the erection of the two story brick building with a stone front on the lower story, situated on the northeast corner of the lot numbered fifty-eight (58) in that part of the town of Washington, in Daviess county, Indiana, formerly called Liverpool, and that I hold you, as the owner of said building, responsible for the payment of the same. September 1st, 1870.

"JOHN O'HALLORAN."

"EXHIBIT B.

"MECHANIC'S LIEN NOTICE.

"Know all whom it may concern, that I, John O'Halloran, of Washington, Daviess county, Indiana, intend to hold a lien on a certain building, three story high, with the lower story finished off with a stone front, situate on the eighteen

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feet on the east side of town lot number fifty-eight, in Washington, formerly called Liverpool, in said county, on the ground where the said building is situated, for the sum of sixty dollars, for balance due, used and expended by me in the construction and building and materials furnished for the building and construction of the same, the said work having been done and completed on the first day of October, 1870, said building and improvements being owned by Mary Leachey. October 13th, 1870. JOHN O'HALLORAN."

The appellee demurred to the above complaint, for the reason that the same did not contain facts sufficient to constitute a cause of action. The demurrer was sustained, and the appellant excepted.

We have not been favored with a brief by the appellee, and do not therefore know upon what grounds the demurrer was sustained. The proceeding is based upon sections 649 and 650 of the code, as amended March 11th, 1867. 3 Ind. Stat. 335.

The remedy provided by section 649 is purely personal, while that provided by section 650 is *in rem*. The one makes the owner personally responsible, while the other creates a lien upon the ground and building. The appellant is attempting to enforce both at the same time, and in one paragraph of the complaint. The proper steps were not taken in the court below to require us to determine whether this can be done.

We have been unable to discover any valid objection to the complaint.

It is suggested by counsel for appellant, in their brief, that the objection urged to the complaint in the court below was, that the notice which was recorded did not sufficiently describe the premises on which the new building was erected. We think there is nothing in the objection. In the case of *Caldwell v. Asbury*, 29 Ind. 451, the notice, which was not as full and definite as in the case at bar, was held to be sufficient. But if the notice was insufficient, the objection could not be raised on a demurrer to the complaint, but only upon

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a motion to strike out that part relating to the lien. *Bourgette v. Hubinger*, 30 Ind. 296.

Under section 649, the notice need not describe the premises. The appellant was entitled to pursue that remedy, although he had taken the steps necessary to create a lien on the premises.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings, in accordance with this opinion.

F. M. Van Trees and *F. W. Burton*, for appellant.

NEWMAN *v.* THE INDIANAPOLIS AND ST. LOUIS R. R. CO.

APPEAL from the Hendricks Circuit Court.

WORDEN, J.—This case involves the same questions that were decided in the case of *Siraughan v. The Indianapolis and St. Louis R. R. Co.*, 38 Ind. 185, and must be affirmed for the reasons therein given.

The judgment below is affirmed, with costs and five per cent. damages.

W. A. McKenzie, C. C. Nave, and —— *Nave*, for appellant.

M. A. Osborn, for appellee.

KESLER *v.* KESLER.

SUPREME COURT.—*Jurisdiction.—Divorce.—Allowance to Wife.*—On an appeal from a judgment in a proceeding for a divorce, the Supreme Court cannot, on the application of the wife, originally made to that court, order an allowance to the wife, to be paid by the husband, for her support and the support of her children during the pendency of the appeal.

Kesler *v.* Kesler.

APPEAL from the Tipton Circuit Court.

DOWNEY, J.—This was a petition by the appellee against the appellant for a divorce, alimony, and the custody of the children of the parties. The defendant answered the petition by a general denial, and filed a cross petition, to which there was also a general denial. The case resulted in a judgment for a divorce to the petitioner in the original petition, for alimony in the amount of twelve hundred dollars, and for the custody of the children, with an allowance for their support. A motion for a new trial was overruled by the court.

The overruling of the motion for a new trial is the only error assigned.

An original application is made to this court for an allowance to the appellee, to be paid by the appellant, for the support of herself and her children during the time while the appeal is pending. The application is based on an affidavit of the appellee. We are of the opinion that the application should not be entertained. There is no statute, nor do we know of any precedent, for the making of such an allowance by this court.

The record is so made up that we cannot tell what is or is not in the bill of exceptions. We can see where it ends, but not where it begins. The clerk does not profess to copy the bill of exceptions, but the evidence is apparently copied by him into the record without being contained in any bill of exceptions. We cannot, therefore, say that the evidence did not justify the finding and judgment.

The judgment is affirmed, with costs.*

N. R. Overman, F. Green, and D. Waugh, for appellant.

F. W. Evans and F. W. Robinson, for appellee.

* Petition for a rehearing overruled.

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CAMPBELL v. CROSS.

PLEADING.—Exhibits.—Written Instruments.—A judgment is not a written instrument within the meaning of the statute requiring copies of written instruments which are the foundations of actions or defences to be set out in pleading.

SAME.—Judgment.—In pleading a judgment, it is not necessary to allege, in addition to the statement of its recovery or rendition, that it still remains in full force, and has not been set aside, vacated, or reversed.

SAME.—Former Adjudications.—In an action to recover the possession of real estate, if the defendant pleads a former adjudication and judgment of title in the defendant, it is not necessary that he should further allege that he is still vested with the title. If the title has since become vested in the plaintiff, this may be set up in reply.

SAME.—To a complaint in two paragraphs, one for the possession of real estate, and the other to quiet the title of the plaintiff, an answer of former adjudication and judgment of title in the defendant is good as to each paragraph.

SAME.—Answer.—To a complaint to recover the possession of real estate, and to quiet the title of the plaintiff, an answer alleging that in a former suit by the plaintiff against the defendant, the defendant was charged with having committed a trespass upon the real estate in question, by cutting and carrying away timber trees growing thereon, and that after issues were joined, the cause was tried, and the only question litigated in the trial was the title to the real estate, and that a finding and judgment was rendered therein in favor of the defendant, was held a good answer.

APPEAL from the Daviess Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellee. There were two paragraphs in the complaint, one to recover possession of certain land, the title to which was alleged to be in the plaintiff, and the other to quiet the plaintiff's alleged title thereto.

The defendant answered, secondly, to both paragraphs of the complaint, that on the 17th of August, 1864, the plaintiff brought an action in said court against the defendant, complaining that the defendant on the first of September, 1863, and on divers other days thereafter, and before the bringing of that suit, entered upon the land in controversy and cut down and destroyed and carried away timber trees growing thereon, to the damage of the plaintiff of one hundred and fifty dollars, during all of which time the plaintiff was the owner of the

39	155
133	160
39	155
153	188
39	155
154	448
39	155
167	433

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land; that the defendant pleaded to that action the general denial, and, secondly, that at the time of the commission of the supposed trespasses, he was the owner of and in the possession of such land, and entitled to such possession; that to this defence, the plaintiff replied by general denial; that the action was tried before the court and a jury; that upon the trial, it was admitted by the parties that the supposed trespasses were committed by the defendant; that the only question litigated by the parties on said trial and submitted to the consideration of said jury was as to the title to the land; that the evidence given on said trial, the argument of counsel, and the instructions of the court were confined to said issue; and that said jury passed upon said title and rendered a verdict in favor of the defendant, and upon the verdict the court rendered a judgment in favor of the defendant.

To this answer, the plaintiff demurred, for want of sufficient facts, etc., but the demurrer was overruled, and the plaintiff excepted. The plaintiff declining to reply, final judgment was rendered for the defendant.

The plaintiff appeals and assigns for error the ruling on the demurrer.

Some objections of a technical character are made to the answer, that may be disposed of before considering the substantial merits of the pleading. It is objected that a copy of the entire record of the judgment pleaded is not filed as a part of the pleading. This court has held, in the case of *Lytle v. Lytle*, 37 Ind. 281, that a judgment is not a written instrument within the meaning of the statute requiring copies of written instruments which are the foundation of an action or defence to be set out. This decision was made after pretty mature consideration, and we adhere to it. The objection, therefore, cannot be sustained.

It is also objected that the answer is defective in not alleging that the judgment pleaded is in full force and not vacated, set aside, or reversed. In the case of *Murphy v. Orr*, 32 Ill. 489, it was held, that it being shown that a decree in

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chancery has been rendered, and it not being made to appear that it has been annulled, reversed, or set aside, it will be presumed that it still remains in full force. Our opinion accords with this proposition. "It is also a general rule of pleading, that matter which should come more properly from the other side need not be stated. In other words, it is enough for each party to make out his own case or defence. He sufficiently substantiates the charge or answer for the purpose of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and therefore is not compelled to notice and remove in his declaration or plea every possible exception, answer, or objection, which may exist, and with which the adversary may intend to oppose him." 1 Chit. Pl. 222. We quote, as directly in point on this question, the following paragraph from the same volume, on page 371: "It is usual also to allege that the judgment still remains in full force and effect, and that the plaintiff has not obtained execution or satisfaction thereof; but this allegation is unnecessary." In a note to a form, in volume 2, page 483, the same author repeats the proposition, that the allegation is unnecessary. The same proposition is stated in 2 Saund. Pl. & Ev. 254, part 1. The same thing is said in a note to one of Abbott's forms. 1 Abbott Forms, 333. We think that on principle, as well as authority, a party in pleading a judgment is not bound to allege, in addition to the statement of its recovery or rendition, that it still remains in full force, etc., because when rendered it is presumed to remain in force until the contrary appears. Presumptions of law need not be stated. If a judgment pleaded has been set aside or reversed, the other party can avail himself of the fact in response to the party pleading the judgment.

The matter, however, is put entirely at rest, so far as an answer of former recovery is concerned, by the form for such answer adopted by the legislature, in which the recovery of the judgment is alleged, without any averment as to its continuing in force. 2 G. & H. 379. These forms are made sufficient in all cases where they are applicable, and in

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other cases, forms may be used as nearly similar as the nature of the case will admit. 2 G. & H. 373, sec. 1. The objection we have been considering is not well taken.

Again, it is urged that although the title may have been settled to have been in the defendant, at the time of the alleged trespass, by the verdict and judgment in the action of trespass, still it may afterward have become vested in the plaintiff, and therefore the answer was bad. We are of a different opinion. If after the trespass the title in any way passed from the defendant to the plaintiff, the fact should have been averred by way of replication. *Abdil v. Abdil*, 33 Ind. 460. We have seen that the complaint contained two paragraphs, one to recover the land, and one to quiet the plaintiff's alleged title thereto; and it is insisted that the answer in question cannot be good as to both paragraphs, and, being pleaded to both, it was bad, and the demurrer should have been sustained. There is no force in this objection. The answer, if good as to either paragraph, was good as to both; for both were based upon the theory that the title was in the plaintiff, and the answer set up matter estopping the plaintiff from setting up such title.

This brings us to the merits of the answer, and we have no doubt it sets up matter that estops the plaintiff to allege or set up title to the land. According to the allegations in the answer, there was an action in a court of competent jurisdiction, between the same parties, in which the title was alleged to be in the defendant, and on this allegation issue was joined, and the issue properly tried by a jury and found for the defendant, and judgment rendered accordingly; the issues thus joined being the only matter controverted on the trial, and the evidence being confined to that issue, the alleged trespass being admitted. Here was an adjudication as to the title of the property, by which the parties were bound. We shall not range through all the authorities on this point. They are numerous. It will be sufficient to cite one or two. In the case of *Outram v. Morewood*, 3 East, 345, it was decided, that "if a verdict be found on any fact

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or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title." So in *Doty v. Brown*, 4 N. Y. 71, it was held, that "the judgment of a court of competent jurisdiction, upon a question directly involved in the suit, is conclusive in a second suit between the same parties, depending on the same question, although the subject-matter of the second action be different."

A verdict and judgment for the defendant in an action of trespass *q. c. f.*, where he pleads *liberum tenementum*, do not necessarily in all cases settle the title to be in him. He may plead other matters also, as a denial of the imputed trespass, and the cause may turn upon other questions than the defendant's title to the property. But parol evidence is competent to show what transpired, and what facts were controverted, on the former trial, and thus show the ground upon which it was decided. *Hargus v. Goodman*, 12 Ind. 629; *Doty v. Brown*, *supra*.

In the case before us, the pleading clearly shows that no question was controverted in the trespass suit but the title to the property. The answer was good, and the demurrer correctly overruled.

The judgment below is affirmed, with costs.

J. W. Burton and S. H. Taylor, for appellant.

N. F. Malott, T. R. Cobb, and J. H. O'Neal, for appellee.

CITY OF INDIANAPOLIS *v.* STURM ET AL.

39 159
150 571

CITY.—*Annexation of Territory.*—*County Commissioners.*—*Appeal.*—No appeal lies from the decision of a board of county commissioners annexing contiguous territory to a city.

APPEAL from the Marion Circuit Court.

PETTIT, J.—This was a proceeding commenced before the

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Board of Commissioners of Marion county by the city of Indianapolis, which is situated in that county, to annex contiguous territory to the city, under secs. 85 and 86, 3 Ind. Stat. 108. The board of commissioners ordered the annexation, from which order the proper, or interested, parties appealed to the circuit court, when, on their motion, the case was dismissed. This ruling was excepted to and is assigned for error. It is also assigned for error that the circuit court had no jurisdiction of the cause, because no appeal lies from the commissioners in such a case.

We hold that no appeal lies in such case as this, and hence that the circuit court had no power to dismiss the petition or case, but should have dismissed the appeal for want of jurisdiction.

This question was fully considered in the case of the *Trustees of the Town of Princeton v. Manck*, 35 Ind. 51, and in *Church v. The Town of Knightstown*, 35 Ind. 177. The cases cited in the case of the *Trustees of the Town of Princeton v. Manck* leave no doubt in our minds as to the correctness of the ruling. Section 86, above cited, says: "Which shall be conclusive evidence of such annexation in all courts in this State." The action of the board is conclusive, and, therefore, there is no appeal. The court below erred in dismissing the petition or case, but should have dismissed the appeal for want of jurisdiction.

The judgment of the court below is reversed, with instructions to dismiss the appeal, at the costs of the appellees in this court.

F. S. Harvey and T. C. Harrison, for appellant.

R. B. Duncan, F. S. Duncan, N. B. Taylor, and E. Taylor, for appellees.

Stewart v. Rankin et al.

STEWART v. RANKIN ET AL.

39	161
129	470
39	161
153	90
89	161
156	355
156	638

PRACTICE.—Bill of Exceptions.—Where a bill of exceptions does not contain the evidence, but refers to it in this language: "Whereupon the plaintiff introduced the following evidence, to wit: (see pages 8 to 18 inclusive), and whereupon the defendant introduced the following evidence, to wit: (see pages 18 to 28 inclusive)," the evidence forms no part of the bill of exceptions, although written in the record as indicated by the clerk.

SAME.—Judge.—A judge should not sign a bill of exceptions in such a case, until the parol testimony has been written out in full in such bill of exceptions, and he has convinced himself of its truth.

APPEAL from the Decatur Circuit Court.

BUSKIRK, C. J.—The appellees sued the appellant on the following instrument:

"This agreement witnesseth that James A. Rankin has this day bargained and sold to Samuel H. Stewart one hundred head of smooth, fat hogs, for eight dollars and fifty cents per hundred pounds; the hogs to be delivered at John Jackman's scales, at Milroy, Rush county, Indiana, between the 1st and the 17th days of October, 1870. Said hogs shall average not less than two hundred and sixty-five (265) pounds each; to be smooth, well-corn-fed hogs.

"The said Stewart agrees to pay the sum of money per hundred pounds above specified for said hogs, and now pays one hundred dollars on this contract, the receipt whereof is hereby acknowledged by the said Rankin. There are to be no sows with pigs or stags among said hogs.

"Witness our hands this 11th day of August, 1870.

"JAMES A. RANKIN,
"SAM. H. STEWART."

It was averred in the complaint, that at the time of the execution of the above contract, the appellees were partners, and were jointly interested therein, although the contract was made in the name of James A. Rankin alone; that on the 1st day of October, 1870, the defendant notified the plaintiffs that he would be ready to receive said hogs at

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said scales on the third day of said month, at five o'clock P. M. of said day; that on said 3d day of October, 1870, at the time and place fixed for the delivery of said stock, the plaintiffs had at said scales one hundred head of hogs of the kind and quality mentioned in said contract, ready for delivery to the defendant, and then and there tendered the same to said defendant, who expressly refused to receive and pay for the same; that said stock so tendered to the defendant were of the weight of thirty-four thousand two hundred and fifty pounds, and that the market price of hogs of the kind and quality mentioned in said contract, and at the time and place fixed for their delivery, was six and one-half dollars per hundred pounds; that the plaintiffs performed all the stipulations of said contract on their part to be performed, and have been damaged by the failure of the defendant to receive said hogs, by the difference between the contract price and the market price of said hogs at said time and place so mentioned above, in the sum of six hundred and eighty-five dollars, upon which the defendant is entitled to a credit for the sum of one hundred dollars paid on said contract; wherefore, etc.

To this complaint the appellant answered by a denial, and there was an agreement to give in evidence under such denial all matters that could be specially pleaded. The cause was tried by the court, and resulted in a finding for the plaintiffs. The court overruled a motion for a new trial, and rendered judgment on the finding, and the appellant excepted.

The appellant has assigned for error the overruling of the motion for a new trial. The principal reason assigned for a new trial was the exclusion of competent and legal evidence offered by the appellant.

No question arises in the case, unless the evidence is in the record by bill of exceptions. It is maintained by the appellees that the evidence is not properly in the record. The bill of exceptions is as follows.

"James A. Rankin and Darius C. Williams v. Samuel H. Stewart. Decatur Circuit Court, fall term, 1870.

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"Be it remembered, that on the —— judicial day of the fall term, 1870, of said court, the said cause came on for trial before the court, without the intervention of a jury, whereupon the plaintiffs introduced the following evidence, to wit: (See pages 8 to 18); and whereupon the defendant introduced the following evidence, to wit: (See pages 18 to 28, inclusive); and while James A. Rankin, one of the plaintiffs, was on the stand as a witness, the defendant put to him questions one (1), two (2), three (3), and four (4), to wit: (See pages 28 and 29); but the court, upon the objection of the plaintiffs' attorneys, refused to allow said questions, or either of them, to be answered; to which ruling the defendant objected and excepted at the time; and after the evidence was all heard, made the following finding, to wit: (See page 5); and whereupon the defendant filed the following motion for a new trial, to wit: (For motion for new trial, see page 6); which motion the court overruled and rendered final judgment on said finding, to all of which the defendant objected and excepted, and still objects and excepts, and asks that this, his bill of exceptions, be signed, sealed, and made a part of the record, which is done accordingly.

[Seal]

"J. M. WILSON."

Following the above bill of exceptions in the transcript, the clerk has copied what purports to be the evidence admitted and that offered and excluded, with exceptions to the ruling of the court.

It is quite obvious that the judge signed a bill of exceptions in blank, probably intending that opposing counsel should afterward agree upon the evidence, and have it inserted in the appropriate places in the bill, over his signature; but the clerk, instead of filling the blanks in the bill of exceptions with the evidence, has set out the evidence in the transcript, and then filled the blanks in the bill of exceptions with references to the pages of the transcript where the evidence would be found.

In making out a bill of exceptions, where the purpose is to make a part of the record a written instrument or docu-

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mentary evidence, it is not necessary to copy such written instrument or documentary evidence into the bill of exceptions; but it shall be sufficient to refer to such instrument or evidence, if its appropriate place be designated by the words, "here insert," and when the clerk makes out the transcript he should fill the blank with the written instrument or documentary evidence referred to. If the paper referred to legitimately constituted a part of the record, and has already been set out in the transcript, the clerk need not again copy it into the bill of exceptions, but may refer to the page and line of the transcript where it may be found. 2 G. & H. 209, sec. 343; sec. 559 of the code, 2 G. & H. 273; *Smith v. Lisher*, 23 Ind. 500.

It is provided by section 346 of the code, 2 G. & H. 209, that, "where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance and signature. If true, the judge shall sign it, whereupon it shall be filed with the pleadings as a part of the record, but shall not be spread at large on the order book. If the writing is not true, the judge shall correct it, or suggest the correction to be made and sign it."

By the above section of the code, it is made the duty of the party excepting to reduce his exception to writing, and present it to the judge for his allowance and signature; and it is made the duty of the judge to examine the bill of exceptions and see whether it contains the truth, and if it does, he must sign it, but if it does not, he must make it speak the truth, and then sign it. A judge may very properly sign a bill of exceptions with a blank, where the purpose is to make a part of the record some written instrument or documentary evidence, but he should never sign a bill of exceptions, purporting to embody the parol testimony until such testimony has been written out in full in such bill of exceptions, and he has convinced himself, either by the consent of opposing counsel or a personal examination, that it contains the truth,

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the whole truth, and nothing but the truth. The law imposes this duty upon the judge, and he should not shrink from its faithful performance, however laborious it may be. The facts recited in a bill of exceptions are regarded by this court as true, and when there is a conflict between the bill of exceptions and some other part of the record, we are governed by the bill of exceptions. The reason of this rule is, that we presume that the judge has faithfully performed his duty, and that the bill speaks the exact truth. We cannot approve of the practice, that exists in some parts of the State, of signing in blank bills of exceptions, embodying the oral evidence, as it is likely to lead to great abuses, and destroy the full faith and credit that has heretofore been given to bills of exceptions. The clerk has copied into the record what purports to be the evidence, but as it was never examined and approved by the judge, and constitutes no part of the bill of exceptions, we cannot regard it as a part of the record. The case of *Kennedy v. The State*, 37 Ind. 355, is very much in point.

The evidence not being in the record, there is no question presented for our decision.

The judgment is affirmed, with costs.

C. Ewing, F. K. Ewing, W. Cumback, and S. A. Bonner, for appellant.

F. S. Scobey, O. B. Scobey, F. Gavin, and F. D. Miller, for appellees.

LIPPERD ET AL. v. EDWARDS ET AL.

ACTION.—*Judgment.—Foreclosure.*—A mere judgment of foreclosure of a mortgage, without a personal judgment for the debt, or for the recovery of the residue after the mortgaged premises have been sold and the proceeds

39	165
186	694
39	165
138	92
39	165
140	459
143	438
39	165
150	305

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applied, cannot be made the foundation of an action for the purpose of collecting an unpaid balance of the debt secured by the mortgage.

PLEADING.—*Joint Action.*—*Demurrer.*—Where two or more plaintiffs join in an action, unless the complaint shows a right of action in favor of both or all of them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

PLEADING.—*Fraud.*—An allegation that a judgment debtor suffered certain mortgaged premises to be sold on execution, subject to incumbrances, for a nominal sum, is not sufficient to constitute a fraud on the part of the judgment debtor.

SAME.—In a complaint to subject real estate held by a wife to the payment of a debt of the husband, it must be clearly shown that the wife knew of the alleged fraudulent intent of the husband in causing the real estate to be conveyed to her, and that she took the conveyance in order to cheat, delay, or defraud the creditors.

APPEAL from the Ripley Circuit Court.

DOWNEY, J.—This was an action by the appellees against the appellants to subject certain real estate, the legal title to which is in Elizabeth Lipperd, to the payment of certain judgments. The first question presented is as to the sufficiency of the complaint. It consisted of two paragraphs. The defendants demurred to each paragraph separately, but their demurrers were overruled, and they excepted. The first paragraph of the complaint alleges that "on the 1st day of September, 1859, the said William J. Edwards obtained a judgment, foreclosing a mortgage, in the circuit court of said county, for one hundred and forty-one dollars, which judgment remains in full force, unpaid and unsatisfied, and there is now due and owing thereon of principal, interest, and costs the sum of," etc., "which judgment is found in order book L, of this court, page 75, to which special reference is made; that on the 29th day of May, 1866, the said George Cornelius, then in life, obtained a judgment in the common pleas court of said county for two hundred and four dollars, which judgment and the interest and costs accrued thereon, amounting to," etc., "remains in full force, unpaid and unsatisfied." Copies of the judgments are alleged to be filed, but they are not filed; that executions were issued on the judgments, and returned *nulla bona*; that said George Cornelius

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is dead, and the plaintiff John B. Cornelius is the administrator of his estate; that from a time long before the oldest of said judgments, said Jacob Lipperd was the owner of, and held the legal title to, the west half of the south-west quarter of section one, township seven, range twelve east, in Ripley county, Indiana, of the value of two thousand dollars, and then, with the fraudulent design and purpose to cheat and defraud his creditors, and especially the plaintiffs, out of their just claims aforesaid, suffered and permitted said land to be sold on execution issued on the judgment first aforesaid, for the nominal price of five dollars, with the purpose of repurchasing the same and taking the legal title thereto in the name of his wife, Elizabeth Lipperd; that on the 27th day of June, 1867, the said Jacob, with the knowledge, consent, and concurrence of his wife, then and there, under pretence of purchase of said lands, paid off a certain judgment in the common pleas court of said county in favor of Moses Lipperd, administrator, etc., against Jacob Lipperd and others, which was a lien on said land prior to said judgment and mortgage of plaintiff Edwards, amounting to, etc., and under the pretence aforesaid, paid off certain other prior and equal liens thereon, amounting to the further sum of one hundred dollars, and then and there caused to be made to his said wife a deed of quitclaim to said land, from William D. Ward, the purchaser thereof at sheriff's sale, as aforesaid, with the fraudulent design and purpose aforesaid, which deed was accepted by his said wife, with the like fraudulent design aforesaid, and to cover up and conceal said land, under pretence of an apparent legal title thereto in his wife; that the whole price thereof was paid by said Jacob from his own money, and, in truth and fact, was paid as aforesaid, in satisfaction of the just debts of said defendant, which were liens on said land as aforesaid, and the money so paid was in fact a redemption of said land from said sheriff's sale, by consent of and agreement with said purchaser; that they had no actual notice of said sheriff's sale, and did not know of the same until after the land was purchased as aforesaid;

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that Jacob Lipperd has no property subject to execution; and that William Lipperd, who is a party defendant to said judgment secondly above set out, is, and since the rendition of said judgment has been, insolvent and without any property subject to execution, out of which said judgment, or any part thereof, can be made; wherefore, etc.

The second paragraph alleges that the defendant Jacob Lipperd, on the 25th day of May, 1867, and for more than ten years previous thereto, was the owner and holder of the legal title in fee simple to said real estate, describing the same as in the first paragraph, at this time of the value of two thousand dollars, and has been, and yet is, in possession of said land; that said Edwards, on the first day of September, 1859, obtained judgment in this court against said Jacob Lipperd for the sum of, etc., amounting with the interest to, etc., and which remains, etc.; that on the 29th day of May, 1866, said George Cornelius, then in life, obtained judgment in the common pleas court of said county for the sum of two hundred and four dollars and costs, which, together with the interest and costs, amounts to, etc., which remains, etc.; that William Lipperd, who was also a defendant in said judgment, is insolvent, etc.; that on the 25th day of May, 1867, Jacob Lipperd suffered and permitted said land to be sold on execution, issued on the said first named judgment, by the sheriff to William D. Ward, for the nominal sum of five dollars, subject to the judgment lien thereon hereinafter stated, with the fraudulent design and purpose to cheat the plaintiffs out of their just claims aforesaid, and on the 27th day of June, 1867, the said defendant, with the knowledge, consent, and connivance of his co-defendant, and with the fraudulent purpose aforesaid, under pretence and cover of a purchase of said land from said Ward for the female defendant, paid to said Ward the nominal price and consideration of thirty dollars, and took from him a deed of release to said land, conveying the same to said female defendant, and then and there also paid off and satisfied the following prior judgment liens on said land, to

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wit: a judgment in the common pleas, etc., of Moses Lipperd, administrator, etc., against said Jacob Lipperd, for, etc., and a judgment in said circuit court in favor of Charles N. Shook, against said Jacob Lipperd, for, etc., being a part of the judgment and decree first above referred to, in favor of plaintiff Edwards; that the pretended purchase aforesaid was, on the part of said defendants, a mere sham and cover for the purpose aforesaid, and that the principal consideration for said conveyance was the paying off of said judgments to the said Ward, who was the attorney for the plaintiffs therein, and that said transaction was, in fact and law, a redemption by said Jacob Lipperd of said land from said sale by the sheriff, as he lawfully might and did do. They further state that they are both non-residents of said county, and neither of them was present at said sheriff's sale, and did not know of the same until long afterward; that said Jacob Lipperd has no property subject to execution; that said George Cornelius died in 1869, and said John-B. Cornelius is the administrator of his estate; wherefore, etc.

Each paragraph of a complaint must be good and sufficient in itself. The first paragraph of the complaint, as will be seen by recurring to it, alleges that Edwards obtained a judgment, and also that George Cornelius recovered a judgment, but it does not state against whom the judgments were recovered. We have decided that in suing or defending upon a judgment, it is not necessary to file a copy of the judgment with the pleading; and it was not necessary, therefore, to file a copy of the judgments in this case with the complaint. But still, it is necessary to state in the pleading, in a case like this, where an indebtedness by judgment is relied upon, the recovery of a judgment against the party who is sought to be affected by it, and whose interest in real estate it is sought to reach. It not appearing by this paragraph of the complaint that any judgment was recovered by either plaintiff against Jacob Lipperd, the paragraph is for this reason insufficient. It appears, further, that the judgment of Edwards was a judgment of foreclosure, and it

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does not appear that there was any general personal judgment against anybody, or a judgment authorizing the collection of any residue after the application of the proceeds of the sale of the mortgaged premises. A mere judgment of foreclosure, without any personal judgment for the debt or the residue of the debt secured by the mortgage, after applying the proceeds of the sale, is exhausted by a sale of the mortgaged premises, and cannot become the foundation of another action, for the purpose of making the balance of the debt secured by the mortgage. It is merely a judgment *in rem*, and when the property has been sold, the judgment has no more vitality. *Buckingham v. Gregg*, 19 Ind. 401. If Edwards shows no right to sue, then, as Cornelius joined in the action with him, neither does he. It seems to be the law now, as it was before the code of civil practice, that where two or more join in an action, the complaint must show a right of action in favor of both or all of them, or the complaint must be held insufficient on a demurrer assigning for cause, that it does not state facts sufficient to constitute a cause of action. *Debolt v. Carter*, 31 Ind. 355; *Berkshire v. Shultz*, 25 Ind. 523; *Mann v. Marsh*, 35 Barb. 68; *Harney v. Owen*, 4 Blackf. 337; *Strange v. Lowe*, 8 Blackf. 243.

The second paragraph of the complaint, in stating the judgment in favor of Cornelius, fails to show against whom it was rendered, and, therefore, does not show a right in Cornelius to unite in the action. The law is settled by several decisions of this court, that to enable a party to sue to set aside a fraudulent conveyance before the adoption of the civil code, he must have obtained a judgment against the party who made the conveyance, and who is alleged to be the equitable owner of the land. To this rule there were some exceptions. Among the first of the cases was that of *O'Brien v. Coulter*, 2 Blackf. 421. The code provides that when the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment,

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although such other matters fall within some other one or more of the classes of causes of action which may be united. 2 G. & H. 99, sec. 72. It may be that, under this provision, a plaintiff may recover a judgment for the debt due him, and in the same action, having the proper parties before the court, have a fraudulent conveyance made by his debtor set aside. But to do this he must show, in the complaint, the existence of a debt due to him from the party who is alleged to have made the fraudulent conveyance. Here it is attempted to show an indebtedness by judgment, but the complaint fails to show against whom the judgment of Cornelius was rendered. We think this omission is fatal to this paragraph of the complaint.

And we think that the allegation in the complaint, that Lipperd suffered the mortgaged premises to be sold on the execution for a nominal sum to Ward, subject to the other incumbrances, does not amount to or constitute a fraud on his part. We must presume that Edwards had ordered the execution issued on his foreclosure judgment, as the contrary is not alleged, and he should have taken notice of the time of the sale, and if he did not think the amount bid by Ward was enough, he should have bid more. Lipperd may not have had it in his power to make the land sell for any more. At all events, we think he was not bound to do so. It is alleged that Jacob Lipperd, with the consent and connivance of his wife, to cheat the plaintiffs out of their claims, paid Ward thirty dollars, and paid off the other incumbrances, and that Ward conveyed the land to Mrs. Lipperd; that this purchase was a sham; that the principal consideration for the conveyance was the paying off of the judgments to Ward, who was the attorney for the plaintiffs therein; and that the transaction was but a redemption by Jacob Lipperd of the land from the sheriff's sale. If it had been alleged that Jacob Lipperd, with his own money and means, purchased the land from Ward, and with intent to cheat and defraud his creditors, caused the title to same to be conveyed to his wife, and that she knew of the fraud and participated in it, the

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other necessary facts being alleged, we should think a case was made on the part of the creditors, which would enable them to maintain an action to set aside the fraudulent conveyance, and subject the land to sale to pay their claims. But the allegations of this paragraph do not show these facts. It is not clearly shown that Mrs. Lipperd knew of the alleged fraudulent intent of her husband, and that she took the conveyance in order to cheat, delay, or defraud the creditors. So far as anything is made to appear, the title of Ward was good and valid. The fraud, if any, consisted in the purchase of the land by Jacob Lipperd, with his own means, and vesting the title in his wife, with intent to cheat, hinder, delay, or defraud his creditors. It should have been clearly shown that she knew of this corrupt intent on the part of her husband, and that she participated in the fraud, by taking the conveyance with a knowledge of his corrupt intent.

It is not enough that fraud on the part of the grantor be shown, but it must also appear that the grantee had notice of the fraudulent intent. *Bunnel v. Witherow*, 29 Ind. 123. The first paragraph of the complaint does allege the fraudulent acceptance of the deed by Mrs. Lipperd, but this one, we think, does not sufficiently allege this fact.

There are other errors assigned, which we do not deem it necessary to consider.

The judgment is reversed, with costs, and the cause remanded.

E. P. Ferris and H. T. Lipperd, for appellants.

F. K. Thompson, for appellees.

HAZZARD ET AL. v. HEACOCK.

PLEADING.—*Corporation*.—An allegation in a pleading, that a certain association is a corporation, organized and assuming to act under and pursuant to

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the provisions of the act of 1865, allowing county commissioners to organize turnpike companies, sufficiently alleges a legally organized corporation.

SAME.—The tax duplicate is not a written instrument within the meaning of the statute requiring copies to be filed with the pleadings.

SAME.—*Uncertainty.*—*Motion.*—If there is an embarrassing uncertainty in a pleading as to the time when an act was done, the remedy is by motion to have it made more certain, and not by demurrer.

TURNPIKE.—*Assessment.*—*Presumption of Law.*—Where a tax is assessed for the purpose of constructing a turnpike, it will be presumed, the contrary not appearing, that the county auditor only made out the duplicate for the amount of tax that was properly collectible.

SAME.—*Distress.*—A tax assessed for the purpose of constructing a turnpike may be collected by distress and sale of personal property.

APPEAL from the Henry Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellants, for trespass in taking and carrying away certain described personal property of the plaintiff. The trespass was alleged to have been committed on the 8th of November, 1869.

The defendants answered, "that on the 8th day of November, 1869, and for a long time prior thereto, the said defendant Hazzard was, and still is, the treasurer of Henry county, in the State of Indiana, duly elected and qualified, and that the said other defendants at said time were, and still are, the deputy treasurers of said county; that on the 1st day of January, 1867, Thomas Rogers, who was then and there the auditor of said county, duly elected and qualified, under and pursuant to an act of the General Assembly of the State of Indiana, entitled, an act to allow county commissioners to organize turnpike companies, etc., approved March 6th, 1865, placed in the hands of said Hazzard, as treasurer aforesaid, as directed in said statute, the amount of taxes and assessment theretofore assessed in favor of the Fairview and Lewisville Turnpike Company, a corporation organized and assuming to act under and pursuant to the provisions of said statute, the amount of tax so assessed against divers persons, on account of lands owned by them within the limits of the road of said turnpike company prescribed by said statute, to be collected as other

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taxes are collected; that in said assessment, there was assessed and charged against this plaintiff on his lands within said limits of said road the sum of three hundred and forty-five dollars and fifteen cents; that on and after the third Monday of April, 1867, the said tax and assessment remained due and unpaid and delinquent up to the said 8th day of November, 1869; that afterward, to wit, on the 8th day of November, 1869, the said George Hazzard, as such treasurer aforesaid, by said Wait Heaton, defendant herein, his deputy as aforesaid, called upon said plaintiff and then and there demanded of him the payment of said tax and assessment, so assessed and charged against him as aforesaid, then in arrear and remaining due and unpaid as aforesaid on said assessment, which said tax and assessment he then and there refused to pay; and thereupon said deputy demanded of said plaintiff a sufficient amount of personal property, out of which the amount of said tax and assessment might be made by levy and sale, with which demand the plaintiff then and there failed to comply; that thereupon the said Hazzard by his said deputies, these defendants, by virtue of said assessment, and by virtue of the authority by law vested in them in such cases, as such treasurer, seized upon and took into his possession the property mentioned in said complaint; and afterward, to wit, on the —— day of ———, 1869, sold the same at public auction, for the purpose of realizing, out of the same, the said assessment and taxes, having first given ten days' notice of the time and place of said sale, by advertisements posted up in three public places in the township where such sale was made, and applied the proceeds of said sale to the payment of said tax and assessment and costs and charges thereon; that said property was seized for the purposes and by the authority aforesaid and none other, and that this is the trespass complained of, and none other; wherefore," etc.

A demurrer was sustained to this answer for the want of sufficient facts, etc., and the defendants excepted. The de-

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fendants declining to answer further, final judgment was rendered for the plaintiff.

The ruling on the demurrer to the answer presents the only question for our consideration.

Was the answer sufficient? We will consider the objections that are made to it. It may be premised that, in the case of *Goodrich v. The Winchester and Deerfield Turnpike Co.*, 26 Ind. 119, this court held the act of March 6th, 1865, constitutional and valid. We see no good ground for changing the conclusion then arrived at.

It is claimed by the appellee, first, that the act of 1865 was repealed by the act of March 11th, 1867 (acts 1867, Reg. Sess. p. 167), or by the act of May 14th, 1869 (3 Ind. Stat. 538), but we are not able to discover such repeal. It is not referred to in either of the latter mentioned acts as repealed. The act of 1869 repeals all other acts in conflict with its provisions, but we do not find any conflict in the provisions of the two acts, and see no valid reason why they may not both stand together.

Again, it is objected that it does not appear from the answer that the "Fairview and Lewisville Turnpike Company" was a legally organized corporation. It is said, in the brief of counsel for the appellee, that no articles of association were ever drawn up or adopted by the persons composing the association. The answer avers that the association was "a corporation organized and assuming to act under and pursuant to the provisions of said statute."

It is claimed that the act of 1865 does not of itself contain provisions sufficient for the organization of a corporation, and that resort must be had to some other law for the manner of effecting an organization. The second section of the act is as follows: "The persons making the application, after receiving from the county commissioners a permit according to this act, can organize themselves into a company, elect such officers, make by-laws and rules for their action as is lawful and proper, under the name they choose in their articles of association." Now, conceding, but not

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deciding, that resort must be had to some other law providing for the manner of effecting a corporate organization, still we think the pleading in question sufficiently shows that the association in question was a legally organized corporation. It is alleged to have been organized and to have assumed to act under the provisions of the act of 1865. It may well have been organized under the act of 1865, and yet, in the mere manner of effecting the organization, have been governed by some other law. It was organized under the act of 1865, if it was organized to carry out and effect the objects and purposes of that act, though some other law provided for the manner of effecting the organization.

The question is not before us, and, therefore, we do not decide, whether in effecting a corporate organization under this act, compliance must be had with some other law as to the steps to be taken in order to effect the organization. Nor do we decide that the treasurer would be bound to determine whether, in such case, a legal organization of a corporation had been effected. The tax duplicate is supposed to be his authority, and if legal on its face, it has been supposed that it would afford him protection. *Ewing v. Robeson*, 15 Ind. 26.

It is also objected that a copy of that portion of the duplicate containing the tax in question is not set out. That was not necessary. The duplicate is not a written instrument within the meaning of the statute requiring copies to be filed. See case above cited. It is claimed that a copy should have been filed, in order to aid the uncertainty as to the time when the assessment was made. The allegation is that the assessment, which had been theretofore made, was placed in the hands of the treasurer by the auditor, on the 1st of January, 1867, but when the assessment was made is not averred. If there was any embarrassing uncertainty as to the time when the assessment was made, it could have been remedied by motion, but was not reached by demurrer. 2 G. & H. 112, sec. 90 and note.

The statute provides, that "the taxes assessed, according

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to the provisions of this act, shall be divided into three instalments, one-third of the whole tax to be paid in one year, one-third in two years, each owner's proportional balance, whatever it may be, within three years from the day of filing the estimate of the cost of the road." Section 6. It is objected that the whole tax does not appear to have been due, nor that it was delinquent. The allegation in this particular is, that there was assessed against the plaintiff, on his lands within the limits of the road, the sum of three hundred and forty-five dollars and fifteen cents, and that on and after the third Monday of April, 1867, the tax remained due and unpaid and delinquent up to the 8th of November, 1869, when the levy was made. We think it fair to presume, as there is a *prima facie* presumption of law that all officers properly discharge their duties, that the auditor made out the assessment for the amount that was properly collectible when the assessment was made; and on demurrer the averment must be taken as true, that the tax became delinquent on the third Monday of April, 1867.

Finally, it is objected that the tax could only be collected from the lands upon which the assessment was made, and that the personal property of the person assessed is not liable to be seized for the tax. We do not concur in this view. Both in the fourth and fifth sections of the statute, it is provided that the taxes shall be collected as other taxes. Other delinquent taxes are collected by distress and sale of the personal property of the person who ought to pay them. 1 G. & H. 97, sec. 96.

The proposition, that such taxes, under such legislation, may be collected by distress and sale of personal property, is fully sustained by the case of *Litchfield v. McComber*, 42 Barb. 288.

We have thus noticed all the objections made to the answer, and conclude that none of them are well taken; and we are of opinion that the demurrer thereto was wrongfully sustained.

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The judgment below is reversed, at the costs of the appellee, and the cause remanded, with directions to the court below to overrule the demurrer to the answer.

M. E. Forkner and E. H. Bundy, for appellants.

J. Brown and R. L. Polk, for appellee.

HAZZARD ET AL. *v.* SOUTHWICK.

APPEAL from the Henry Circuit Court.

WORDEN, J.—This cause is essentially like that of *Hazzard v. Heacock*, *ante*, p. 172, was submitted on the same briefs, and must be decided in the same way.

The judgment below is reversed, with costs.

M. E. Forkner and E. H. Bundy, for appellants.

J. Brown and R. L. Polk, for appellee.

EMMONS *v.* KELLER.

PRACTICE.—*Assignment of Error*.—Where a complaint asked for the appointment of a receiver, and the court found that a receiver should be appointed, but no receiver was in fact appointed;

Held, that the failure of the court to appoint a receiver could not be assigned as error by the defendant, when he did not ask for such appointment, but opposed it.

APPEAL from the Boone Common Pleas.

BUSKIRK, C. J.—This was an action by the appellee against the appellant to recover damages for an alleged breach of the terms and conditions of a written contract, which reads as follows:

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“STATE OF INDIANA, TIPTON COUNTY.

“This indenture witnesseth that Robert H. Keller, of Tipton county, State of Indiana, has bargained, and leased, and rented to Hamilton Emmons, of the county of Hamilton, and State aforesaid, a portable steam saw-mill, now owned by said Keller, and now being in operation in said Tipton county, for the purposes and objects hereinafter stated. The said Emmons to pay said Keller thirty cents per hundred feet, log measure, according to Scribloy's log book; the thirty cents per hundred feet, above named, is to be applied by said Emmons, as hereinafter named, to pay and discharge a debt payable by said Keller, Emmons, Arch Small, and Mitchell Boatman, said Keller and Emmons principals, and due to the Eagle Machine Works at Indianapolis, Indiana, in and about the sum of twenty-nine hundred and sixty-three dollars, principal and interest. Said Emmons to use proper diligence in operating the said mill to the best interest of lessor, in order that the said debt may be paid and discharged at as early a day as may with diligence be done. Said Emmons to furnish said Keller a monthly statement of the earnings of said mill, at thirty cents per hundred feet, as aforesaid. Said Emmons to have the possession of said mill at once, from the execution of this contract by said parties hereto, and to take such possession at the place where the same now is; all the machinery and implements for operating said mill, and on hand and belonging exclusively to said mill, to go with said mill. Said Emmons to be at all expense of any moving, operating, and repairs of said mill; and said Emmons shall not move said mill more than thirty miles in any direction from where the same now is; and when said mill has earned sufficient money, at thirty cents per hundred feet, to pay and discharge the aforesaid debt, then the said Emmons shall redeliver said mill to said Keller at the place where it may then be, not being out of the bounds aforesaid. And if said Emmons shall fail, at the end of three months from the date hereof, to apply so much of the rent as he earned to the payment of said debt afore-

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said, he, said Emmons, by such failure, hereby is to, and does hereby, forfeit all further rights under this contract, and said mill shall revert to said Keller, with the right to the immediate possession; and if the said Emmons, between the end of the said three months and three months thereafter, and from the end of six months and two months thereafter, shall, as aforesaid, fail to apply the earnings of said mill to the paying and discharging of said debt, then, and in that case, the said Keller shall be entitled to a return of said mill and immediate possession; and when said debt shall be fully paid, said Emmons to redeliver said mill to said Keller, as aforesaid, in as good order and condition as the same now is, reasonable wear only excepted.

"In witness whereof, we, Robert H. Keller and Hamilton Emmons, hereto set our hands, this 1st day of November, 1869.

"Attest:

"CHRIS. MEHLIG.

ROBERT H. KELLER,
HAMILTON EMMONS."

The substantial averments of the complaint were, that Emmons, immediately after the execution of the above contract, took the possession of the said mill and removed the same into Boone county, in said State; that at the date of the said contract, the said mill was capable of cutting five thousand feet of lumber per day, with one good set of hands, and with a change of hands would have cut ten thousand feet of lumber per day; and that the said mill would have averaged, with one set of hands, during the time said defendant had been in possession of the same, including and allowing for stoppages and repairs, at least three thousand feet per day; that there was an abundance of timber at many convenient places within thirty miles of where the mill was at the time of the contract of renting, which could have been procured on fair and easy terms, and sufficient to have kept said mill in constant operation; that the said defendant might have cut eight hundred and ten thousand feet of lumber during the time he had been operating the same, which, at thirty cents per hundred, would

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have amounted to twenty-four hundred and thirty dollars; and by means of a little extra help and a little extra diligence, the said mill might have cut a much larger amount, and might have discharged the entire debt; while, by the negligence and want of care and diligence of the defendant, his monthly reports, if true, show that he has cut only one hundred and forty-seven thousand three hundred and ten feet, and that he has discharged only four hundred and twenty-three dollars and fifty cents of said debt; that the defendant had actually sawed and received the money for a much larger amount of lumber than he had reported, etc.

The prayer of the complaint was for a judgment for damages, and the appointment of a receiver to take charge of and operate the said mill until the said debt was paid and discharged, and for general relief.

A demurrer was overruled to the complaint, and the defendant excepted; but as no error has been assigned on such ruling, we need not further notice the matter. The defendant then filed a written motion to strike out of the complaint all that related to the appointment of a receiver, which motion was overruled, and he excepted and has reserved the question by a bill of exceptions.

The defendant answered by the general denial. The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the plaintiff in the sum of five hundred and eleven dollars and seventy-four cents. The court also found, upon the proof and certain affidavits which were filed, that a receiver should be appointed.

The defendant moved the court for a new trial, for the reasons that the evidence did not support the finding of the court, and for error of law in appointing a receiver. The motion was overruled, and the defendant excepted. The court rendered judgment on the finding, and caused to be entered an order appointing — a receiver, but it appears that no receiver was in fact appointed.

The defendant appeals, and assigns for error the following: first, the court erred in overruling the motion for a new

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trial; second, the finding and judgment of the court was contrary to law; third, the finding and judgment of the court was contrary to the evidence; fourth, the court did not appoint a receiver; fifth, the court erred in overruling the motion to strike out of the complaint all that related to the appointment of a receiver.

It is very obvious that the only valid assignment of error is the one based upon the action of the court in overruling the motion for a new trial. The second and third were embraced in the first. The failure of the court to appoint a receiver cannot be assigned as error by the defendant, when he did not ask for such appointment, but opposed it. The defendant asked for a new trial, because the court had erred in the appointment of a receiver, but has assigned for error the failure of the court to make such appointment. Upon such a condition of the record, no question is presented for our decision in reference to the appointment of a receiver; and besides, there was no receiver appointed, and if there had been, no question would be presented, for the reason that no motion was made to set aside or modify the judgment. The mere finding of the court, that a receiver ought to be appointed, without an actual appointment, can result in no injury to the appellant.

The only question presented for our decision is, whether the finding of the court was supported by sufficient evidence. We have read the evidence with care, and are entirely satisfied that the evidence fully justified the finding and judgment of the court.

The judgment is affirmed, with costs.

F. T. Dye and A. C. Harris, for appellant.

L. Barbour and C. P. Jacobs, for appellee.

Kittering v. Norville.

KITTERING v. NORVILLE.

PRACTICE.—*Joint Contractors.*—*Abatement of Action.*—*Dismissal.*—A. sued B. and C. before a justice of the peace, on a promissory note made by them. B. was served with process, but C. was not served, and the fact was so entered upon the docket. B. appeared to the action, and, after two continuances, the cause was tried, and judgment was rendered against B. Afterward, suit was commenced before another justice on the same note against C.

Held, that although there was no dismissal of the former action as to C., the going into trial and proceeding against B., under the circumstances, caused the action to abate as to C., and was, in effect, the same as a dismissal of the former action as to C., and saved the right of A. to sue him in the latter action.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—The appellee sued the appellant, and had judgment in his favor. In this court two errors are assigned; the first is as to the sufficiency of the complaint, and the second relates to the correctness of the ruling of the court in overruling the motion of the appellant for a new trial. Whether the case is to be considered upon the demurrer to the complaint, or upon the motion for a new trial, there is but one question presented and discussed. Kittering and one Emerick executed a joint promissory note to one Tillberry, who indorsed the same to Norville. Norville brought suit on the note before Justice Fisher, of Marion county, against both the makers. But Kittering was a resident of Shelby county, and was not found. The constable's return to the summons was as follows: "Served on Emerick by reading, the other said to live in Shelby county, November 7th, 1866." At the foot of the judgment, the justice says: "It appears from the return of the summons that the defendant Christian Kittering has not been served with process." Emerick answered, the cause was tried by the justice after two continuances, and there was judgment against Emerick for the amount due on the note.

Afterward this action was commenced before Justice Carson against Kittering on the same note. The question now is, whether the judgment by Justice Fisher is a bar or not to this action.

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It is the general rule, that a judgment against one of the makers of a joint promissory note is a bar to an action subsequently brought against the other or others on the same note.

In the absence of statutory enactments to the contrary, the rule is uniformly applied. It is claimed, however, that it should not be applied in this case, and we are referred to the following statute on the subject: "When a summons is returned not found as to part of the defendants, the plaintiff at his option may continue for alias process, or suggest the return on the record, dismiss the cause as to the defendants not found, and proceed against those served; and such plaintiff may at any time afterward proceed against those not found." 2 G. & H. 593, sec. 63.

It will be seen that in this case, on the return of the process, the plaintiff did not formally dismiss the action as to the defendant not found, nor did he have the cause continued for alias process as to him. Was not the course pursued by the plaintiff, in effect, the same as a dismissal of the action as to the defendant not found? We think it was. In the case of *Conwell v. Smith*, 4 Ind. 359, this court, in speaking of a statute nearly similar to the one in question, say that when the writ is returned not found as to a portion of the defendants, two courses are open to the plaintiff. He may continue the cause for process, or he may suggest the return of not found and proceed, etc., against those served.

"If he adopt the latter, he may afterward proceed by action against those 'not found,' jointly or severally.

"In the case at bar, the plaintiff did neither; and the proceeding was consequently irregular. The effect of his going into trial under such circumstances is, that as to those on whom the process had not been served, the writ abated. In the language of the opinion of the court, in *Palmer v. Crosby*, 1 Blackf. 139, 'they were no more parties to the action than if their names had not been in the writ.'" See *Rose v. Comstock*, 17 Ind. 1.

The course pursued by the plaintiff was, in effect then, the

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same as a dismissal of the action as to Kittering, and saved the right of the plaintiff to sue him in the present action.

The judgment is affirmed, with costs.

O. F. Glessner, for appellant.

B. F. Love, B. F. Davis, M. M. Ray, G. H. Voss, and J. A. Holman, for appellee.

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DIVORCE.—Order for Payment of Money.—Where, during the pendency of a proceeding for a divorce, the wife filed an affidavit that her husband was the owner of real estate of the value of six thousand dollars and personal property worth eight hundred dollars, and that she had no money or property to enable her to prepare her case for trial, it was proper for the court to order the payment by her husband into the clerk's office of one hundred dollars for her use. On an appeal from such an interlocutory order, no question will be considered involving the sufficiency of the complaint for a divorce.

APPEAL from the Howard Circuit Court.

BUISKIRK, C. J.—This is an appeal from an interlocutory order of the court below requiring the appellant to pay into the clerk's office the sum of one hundred dollars, for the use of the appellee, to enable her to prosecute her action for a divorce.

Two questions are argued by counsel; first, that the court possessed no power to make the order at the time it was made; second, that the facts stated in the affidavits did not justify the order.

The order from which the appeal was taken was made before the trial of the cause, and was made to enable her to prepare for such trial. The position assumed by the appellant is, that the court had no right to make an allowance until the final decision of the cause.

The solution of the question depends upon the construc-

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tion to be placed upon the seventeenth section of the divorce act, which reads as follows:

"Sec. 17. Pending a petition for divorce, the court, or the judge thereof in vacation, may make, and by attachment enforce such orders for the disposition of the persons, property and children, of the parties as may be deemed right and proper, and such orders relative to the expenses of such suit as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof, and on decreeing a divorce in favor of the wife, or refusing one on the application of the husband, the court shall by order, to be enforced by attachment, require the husband to pay all reasonable expenses of the wife in the prosecution or defence of the petition when such divorce has been so granted or refused."

In support of the above position, the counsel for the appellant refer us to the case of *Hart v. Hart*, 11 Ind. 384.

That case seems to bear the construction contended for, but we do not believe that the learned judge who delivered the opinion ever intended that the opinion should bear any such construction. The facts upon which the ruling was made were these: Hart brought a suit for a divorce against his wife. The wife appeared and asked for an allowance to enable her to defend the suit. The court refused the allowance. Subsequently, before the final hearing, the plaintiff dismissed his suit, and there was judgment against him for costs.

The defendant then renewed her application for an allowance, and the court ordered the plaintiff to pay her one hundred dollars. The plaintiff excepted and appealed from the order. The court say: "The court assumed to act, in making the order, under sec. 17, 2 R. S. 236. We do not think the section authorized the act of the court. It only authorizes such an order where there is a decree rendered for or against a divorce on the final hearing."

It should be observed that the wife took no exception to the refusal of the court to make her an allowance, and as-

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signed no cross errors on such ruling. The court, therefore, decided nothing in reference to the refusal of the court to make an allowance to the wife pending the action.

The order which the court made, and from which the appeal was taken, was made after the action had been dismissed. The wife had not filed a cross complaint. At the time the allowance was made, there was no action pending, and the allowance was unauthorized by the first clause of the above quoted section, because, first, there was no action pending; and second, there was no necessity for an efficient preparation of her case for a fair and impartial trial. The allowance was equally unauthorized by the latter clause of said section, for the reason that no divorce had been decreed to the wife or refused on the application of the husband. The action was dismissed. No evidence was heard. The court neither granted a divorce in favor of the wife nor refused one on the application of the husband.

The above section contains two separate and distinct propositions. The one is, that "pending a petition for a divorce, the court, or the judge thereof in vacation, may make, and by attachment enforce, such orders for the disposition of the persons, the property, and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such suit as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof."

The other proposition is, that "on decreeing a divorce in favor of the wife, or refusing one on the application of the husband, the court shall by order, to be enforced by attachment, require the husband to pay all reasonable expenses of the wife in the prosecution or defence of the petition when such divorce has been so granted or refused."

The first allowance provided for has to be made while the action is pending, and only to such an amount "as shall insure to the wife an efficient preparation of her case and a fair and impartial trial thereof."

The second allowance is to be made after a divorce has been decreed in favor of the wife, or refused on the applica-

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tion of the husband, and shall be for a sum sufficient "to pay all reasonable expenses of the wife in the prosecution or defence of the petition."

It is made the imperative duty of the court, in decreeing a divorce to the wife, or refusing one to the husband, to make an allowance sufficient to cover all reasonable expenses of the wife in the prosecution or defence of the action. The language of the statute is, that the court shall make such orders, etc.

The language employed in the first branch of said section is quite different—the court may make such orders, etc. The court is only required to act, in the making of the allowance under the first branch, upon the application of the wife, or some one in her behalf. Whether the court shall make any allowance, and if any, how much, depends upon the facts that may be shown by affidavit. No allowance should be made, unless a necessity therefor is shown; but when the necessity is shown to exist, then an allowance should be made sufficient to insure efficient preparation and a fair and impartial trial of the case. If it is necessary to take depositions, or procure the attendance of witnesses from other counties, or to obtain the services of a competent attorney to conduct her case, or to provide herself with comfortable lodging and boarding, and suitable apparel, an allowance should be made sufficient to provide for such things during the pendency of the action for divorce.

It was said by this court, in *Kenemer v. Kenemer*, 26 Ind. 330, that "if she had either funds or credit sufficient for the purposes of her defence and her present support, it would have been improper for the court to require her husband to furnish money for such purposes, pending the litigation. Her affidavit does not show such a state of facts as would require the court to make such an order upon the appellee."

The above case, as well as that of *Kernodle v. Cason*, 25 Ind. 362, very clearly establishes the doctrine, that it is the duty of the court to make a reasonable allowance during

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the pendency of the action. The court, in decreeing a divorce to the wife, or in refusing one to the husband, should take into consideration, in making an allowance for the reasonable expenses of the wife, any allowance that was made during the pendency of the action.

We think that it is quite clear that the court had the power to make the allowance at the time and in the manner that it was done.

It remains for us to inquire whether the court was justified, by the facts stated in the affidavits, in making the allowance. It was stated by the appellee, in her affidavit, that the appellant was the owner of real estate of the value of six thousand dollars, and personal property of the value of about eight hundred dollars; that she left her home with nothing but her clothes, and there were very few of them, and without one cent of money, or other property out of which she could make any money, and she has no money or property of any kind except her few clothes; that she is now, and has been ever since the separation from him, working from day to day in the kitchen of strangers for her board, shelter, and lodging, which she must continue to do for sustenance until the termination of this suit; that she only asks the court to make her a reasonable allowance against the defendant, to be paid into court for her immediate benefit, to enable her to secure her counsel and witnesses and prepare her case for trial, which she declares to the court she cannot do without the aid of the court.

The substance of the affidavit of the appellant was, that the plaintiff had no just cause for a divorce, and that he had; that when the plaintiff left his house, she took with her two hundred and fifty dollars worth of property (but he does not state what kind of property it was, whether it was her clothing or bedding, or what had been done with it); that since her abandonment she had purchased on his credit about fifty dollars worth of goods; that he had no property of any value except his real estate; that he had sold his personal property on a nine months' credit, and had no money, and

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did not know where he could coaveniently borrow any money.

There was nothing in this affidavit that contradicted the facts stated by the appellee, except the very loose and unsatisfactory statement about the amount and value of the property which she had taken away with her and had subsequently purchased on his credit, but there was no averment that she had any of such property. The real question for the court was, whether she then had the means necessary to a comfortable support and to enable her to make an efficient preparation of her case, and to obtain a fair and impartial trial. It is gravely maintained by the counsel for appellant, among other things, that the court should not have made the allowance, because the appellant had shown by his affidavit that he had just cause for a divorce, and that his wife had not. This was the very question that was to be determined by the trial of the cause; and in such a contest, the wife without property, money, or means to employ counsel, procure witnesses, and prepare her case for trial, would have a very poor chance, especially if she was compelled, as in this case, to work day by day to procure lodg-ing and support.

We entertain no doubt that the facts not only fully justified, but required the court to make the allowance; and, in our judgment, the allowance made was a very reasonable one.

We are asked by the appellant to defermine whether the court erred in overruling a demurrer to the complaint, and in overruling a motion to make it more specific. There is no question here for decision, except the one of whether the court erred in making the allowance. It was this that gave the right of appeal to this court before the final trial of the cause. It was only necessary to set out the complaint, to enable us to know what kind of a case it was. When the cause is tried on its merits, it will be time enough to appeal from a final judgment.

The Board of Commissioners of Jackson County *v.* Elliott.

The judgment is affirmed, with costs and ten per cent. damages.

C. N. Pollard, — Murray, and F. H. Kroh, for appellant.
H. A. Brouse, for appellee.

THE BOARD OF COMMISSIONERS OF JACKSON COUNTY *v.* ELLIOTT.

SOLDIER'S WIDOW.—*Relief*.—Since the 3d of March, 1866, widows of soldiers who died of disease contracted in the military service of the United States cannot, under the statute of March 4th, 1865, as a matter of right, enforce any claim against a county on account of said services.

APPEAL from the Jackson Circuit Court.

WORDEN, J.—In June, 1869, the appellee commenced this action in the circuit court, against the appellant, to recover money claimed to be due her as the widow of Rawley A. C. Elliott, a non-commissioned officer in the military service of the United States, and who died of disease contracted in such service. Her claim was based on the act of March 4th, 1865, for the relief of the families of soldiers, etc. Acts 1865, Regular Session, 93.

The appellant resisted the claim, but such proceedings were had as that it was allowed by the court; and the appellant excepted and brings the case here.

In the case of *Sims v. The Board of Commissioners of Monroe County*, *ante*, p. 40, we have decided that by the act of December 20th, 1865 (Acts 1865, Special Session, 59), the former law was so far repealed and modified as that on and after the 3d day of March, 1866, all disbursements under the former law ceased; and that after that date it was discretionary with the commissioners to make or not make allowances in any given case, under the provisions of

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the latter statute; in other words, it was decided that after the 3d of March, 1866, such widows could not enforce any claim against the county under those statutes, as a matter of right.

It follows that the judgment below is erroneous and must be reversed.

The judgment below is reversed, with costs, and the cause remanded.

J. B. Brown, for appellant.

Alspaugh & Baynes and *J. R. Troxell*, for appellee.

THE BOARD OF COMMISSIONERS OF CRAWFORD COUNTY v. THE LOUISVILLE, NEW ALBANY, AND ST. LOUIS AIR LINE RAILWAY COMPANY.

39	192
162	293
162	593
162	602
39	192
166	181
166	183
166	186
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CONSTITUTIONAL LAW.—*Incorporated Company*.—A county cannot, under section 6 of article 10 of the constitution, take stock in any incorporated company without paying the money down; and section 17 of the act of May 12th, 1869, for aiding railroads, does not conflict with this provision of the constitution.

STOCK IN INCORPORATED COMPANY.—*County Commissioners*.—*Voters*.—All the acts of county commissioners and the voters of a county, in taking steps to raise money to take stock in an incorporated company, are between themselves, one the principal, and the other the agent; there is no contract with the incorporated company, nor has she any right in, or control over, the matter, until the money is raised and the stock taken.

SAME.—*Mandate*.—One or more of the voters might, in such case, maintain a suit for a mandate against the commissioners, to compel them to act, but the incorporated company cannot maintain such suit.

SAME.—Where money is raised for the purpose of taking stock in a railroad company, the company cannot have any of the money until she has fully constructed the road, so that cars shall pass over the same; and no one but a petitioner, or a tax-payer, can have a mandate to compel the payment of the money.

APPEAL from the Vanderburg Circuit Court.

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- PELLIT, J.—This suit was brought by the appellee for a peremptory mandate, to compel the appellant to levy a tax, which it was alleged had been voted by the people of Crawford county to aid in the construction of appellee's road, by taking stock therein, under act of May 12th, 1869.

It will be a sufficient statement of the complaint to say it showed that all of the preliminary steps had been properly taken, including the vote and its proper return, showing a majority of forty-four votes for the appropriation, in December, 1869; that at the regular June session of 1870, the appellant had been requested by the appellee, by her attorneys, to levy the tax, and that appellant refused to do so, and a peremptory mandate was asked to compel the performance of this alleged duty on the part of the appellant. To this complaint the appellant demurred, on the grounds and in the form following: first, because the complaint does not state facts sufficient to constitute a cause of action; second, because the plaintiff has not legal capacity to sue and maintain this action, because, first, the complaint does not show that the plaintiff is a resident or tax-payer of Crawford county, and does not show that the plaintiff has any legal interest in the subject-matter of the action; second, the complaint does not show that the defendant has subscribed stock in the plaintiff's railroad, or that she is authorized by law to subscribe stock; third, the complaint does not show that any money has been levied or collected or any subscribed by the defendant for plaintiff's railroad, nor that the plaintiff has so far completed her railroad as to be entitled to demand any money which might be subscribed by defendant. Perhaps the first ground of demurrer covers and embraces all the others. The demurrer was overruled, and exception taken, and this ruling presents the first question for our consideration.

Does the complaint show a right in the plaintiff to prosecute this suit, or could the plaintiff at this stage have any right in the money voted, that would entitle her to compel

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the defendant to collect the money and invest it in the stock of the road? It is a well settled and well known general principle of the common law, as well as of our statute, that to enable a plaintiff to maintain an action at law, he must have a present subsisting legal interest in the matter sued for, and the present action certainly is no exception to the general rule. Article 10, section 6, of our constitution, provides, that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." The language of this section cannot be misunderstood. No county can create any liability to any incorporated company without paying the money down, nor can she loan her credit to any such company. All of the acts of the commissioners and the voters of the county, in taking steps to raise the money, are between themselves, one the principal and the other the agent; there is no contract with the company, nor has she any right in, or control over, the matter, till the money is raised, and the stock taken. Till that time, the principal and agent alone have control of the proceedings. One or more of the voters might maintain a mandate against the commissioners, because he or they would have a legal interest in it; but the company cannot maintain such suit, because she has no legal interest to enforce, no contract ever having been made with her. Nor can the company have any of the money raised for the purpose of taking stock, till she has fully constructed the road, so that cars shall pass over the same. The 17th section of the act for the aiding of railroads does not conflict with the above section of the constitution, but clearly warrants our ruling. It is as follows:

"Sec. 17. After the money authorized by this act to be appropriated shall have been levied and collected as aforesaid, and the subscription shall have been made on behalf of the county or township, as the case may be, the railroad company for whose aid the same shall have been so levied

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and collected, having fully constructed the railroad contemplated in said petition, so that trains of cars shall pass over the same, shall have the right to demand and have said money paid over according to the intent and meaning of this act; and any one of said petitioners, or any tax-payer of the county or township, as the case may be, may compel the same to be done by mandate against the county commissioners."

Here it will be seen that any petitioner or tax-payer may have a mandate. Why? Because they have a legal interest in the matter, but the company cannot prosecute a mandate, because she has no such interest, and under the rule of construction, that the expression of one excludes all others, she is excluded. It is expressed as to who may have a mandate, and this expression excludes all others. The authorities fully warrant us in this ruling. Moses on Mandamus, page 194, says: "It has been held that a private citizen has no right to apply for a mandamus to compel a public officer to perform an omitted duty, in a case where he is not directly injured by its non-performance. That where the public rights are to be subserved, it is for the public officers exclusively, to apply for the writ. *Sanger v. The County Commissioners of Kennebec*, 25 Maine, 291; *People v. Regents of the University*, 4 Mich. 98; *The People v. The Inspectors, etc., State Prison*, 4 Mich. 187." See other cases cited by Moses, on pages 195, 196, *et seq.* *Aspinwall v. The Board of Comm'rs of the County of Daviess*, 22 How. U. S. 364, is a strong authority against the right of the railroad company to maintain this suit. We take the following case from the "Indiana Legal Register," of October, 1871, Vol. I, No. 1, p. 5:

"SUPREME COURT OF KANSAS.

"The Land Grant Railway and Trust Company, and the Union Pacific Railway Company, Southern Branch, v. The Board of Commissioners of Davis County.

"Original Proceeding in Mandamus from Davis County.

"VALENTINE, J.—In this action, which is an original pro-

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ceeding in mandamus, commenced May 26th, 1870, the plaintiffs, the Land Grant Railway and Trust Company, and the Union Pacific Railway, Southern Branch (now the Missouri, Kansas, and Texas Railway Company), seek to compel the defendant, the board of county commissioners of Davis county, to subscribe to the capital stock of the said Union Pacific Railway Company, Southern Branch, to the amount of one hundred and sixty-five thousand dollars, and to issue in payment therefor an equal amount of bonds of said Davis county, and deliver them to said plaintiffs.

"We have already decided, in the case of *The Land Grant Railway and Trust Company v. The Board of County Commissioners of Coffey County*, 6 Kan. 245, that the said Land Grant Railway and Trust Company had no legal capacity to transact any kind of business in Kansas, and, therefore, it follows that this action must be dismissed as to said Land Grant Railway and Trust Company.

"Whether the Union Pacific Railway Company, Southern Branch, may proceed as the sole plaintiff, without making a new application for a writ of mandamus, we are not asked to decide. We shall, therefore, consider this action as though commenced by the Union Pacific Railway Company, Southern Branch, alone.

"On the 15th of July, 1867, the people of Davis county voted to subscribe to the capital stock of the Union Pacific Railway Company, Southern Branch, to the amount of one hundred and sixty-five thousand dollars, and issue in payment therefor an equal amount of the bonds of said county, upon the following conditions: first, that one-half of the bonds shall be issued on the completion of the road ready for the iron, ten miles from the commencement thereof, and none before, and that the other half shall be issued on completion of the next ten miles ready for the rolling stock, making twenty miles from the starting point to Junction City; second, that the said road shall be commenced at Junction City within one year from the date of the election; third, that it shall be completed through Davis county within two years from

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the date of the election; fourth, that said bonds shall not issue, in case money or other aid is hereafter received by said company from the United States government; fifth, that the county reserves the right to purchase the bonds at any time after the issue at the market value.

"We will assume, for the purpose of this argument, that every one of the foregoing conditions was fulfilled, so that the county commissioners of said county could have subscribed said stock and issued said bonds, if they had so chosen.

"Said commissioners, however, never subscribed said stock, and never agreed to subscribe the same; and the railway company never asked them to subscribe until about the commencement of their suit.

"The questions arising in this case are as follows:

"First. Was the vote of the people of Davis county of itself a contract between the county and the railway company, which the railway company can enforce? and, if not,

"Second, was said vote of itself a proposition to the railway company, which the railway company could accept and make binding on the county? and, if so, must the acceptance be a formal acceptance in writing, or a verbal acceptance? and when must the acceptance be made? or could the railway company accept the proposition by simply complying with the conditions of said vote?

"But if there was no contract between the county and the railway company, then,

"Third, did the county commissioners, by virtue of said vote, owe a duty to subscribe said stock to any one, which they could be compelled to perform, or had they a discretion in the matter? and if they did owe a duty, to whom did they owe it, the railway company or to the people of Davis county? and if not to the railway company, then is the railway company entitled to a writ of mandamus to compel them to subscribe said stock?

"The nature of a contract is pretty clearly defined in the case of *The State v. Barker*, 4 Kan. 379. A contract is 'the

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agreement of two competent parties, about a legal and competent subject-matter, upon a mutual legal consideration, with a mutuality of obligation.' 1 Ohio St. 657.

"Taking this definition of a contract to be correct, it is clear that no contract was ever made between the county of Davis and the railway company. No agreement was ever made by either party, and neither party was ever bound.

"It seems to be, partially at least, admitted by the plaintiffs that the vote alone of the people of Davis county did not create a contract between the county and the railway company; but it is claimed that the vote was of itself a proposition to the railway company, which the railway company accepted by performing the condition of the vote, and thereby a contract was created between the railway company and the county, and binding upon the county. But counties do not act in their primary capacity in making contracts; they act only through their legally constituted agents.

"It is the commissioners of the county only that are authorized to subscribe stock in a railway company, and not the people of the county. Laws of 1866, p. 72. And a railway company cannot contract with a county in any way except through the county commissioners.

"The plaintiff claims that this transaction is analogous to the case where a person offers a reward for the recovery of stolen property, or for some other purpose; but there are at least two very great distinctions.

"A. makes a proposition to the whole world that he will pay one hundred dollars reward to the person who will return him his stolen horse. B. accepts the proposition, impliedly at least, and returns the horse. Here is a contract binding on A. But suppose that A. authorized his agent, C., to make the proposition, but C. refused to do so, and the proposition was never made, but that notwithstanding no proposition was ever made, B. returns the horse; is A. liable for the one hundred dollars? Or suppose that A. offers a reward to B. for building a house on B.'s own land, and just such a house as B. intends to build, whether the proposition

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is made or not, and B., without accepting the proposition of A., expressly, builds a house; is A. liable?

"In this case, the people of Davis county did not make any proposition to the railway company, but simply authorized their agents, the county commissioners, to make a proposition to said company to subscribe said stock in the company, provided the company should build their road through Davis county; a thing which it must be presumed the company intended to do, whether the stock was subscribed or not, as the corporation was created and organized, among other things, for that express purpose, long before said vote was had.

"Suppose a railroad company is organized with a capital stock of three hundred thousand dollars, for the purpose of building a railroad from the town of A. to the town of B., and one of the counties through which the road is located, without the express consent of the railroad company, votes to subscribe three hundred thousand dollars of stock in said company when the road shall be completed, and the company proceeds under their charter and builds their road; then is the company bound to allow the county to subscribe said stock, which is all there is, and deliver over to the county their charter, their franchises, and all their property? Suppose the company in the meantime had sold a portion of their stock to individuals, one-half of it, or the whole of it, so that the company could not deliver to the county the three hundred thousand dollars of stock; what then? And suppose that the stock had advanced, and the bonds had depreciated in value, so that the stock was worth the most; would the railroad company then be bound? And if for any reason there is no contract that can bind the railroad company, is there any contract that can bind the county? As a general proposition. (with but one exception that I now think of, and that is, where a person of full age contracts with a minor), a contract, to be binding on either party, must be binding on both. 22 How. 364; 12 B. Mon. 144, *et seq.*;

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22 Ill. 147, *et seq.*; 18 Barb. 317, *et seq.*; 21 Wend. 139, *et seq.*

"It is our opinion that there never was any contract between the county and the railway company; and therefore, as a necessary consequence, the county commissioners, who are the agents and representatives of the county, and not of the railway company, owe no duty to the railway company; and as a further consequence, the said commissioners could not be compelled, on any application of the railway company, to subscribe said stock.

"The writ of mandamus is refused, all the justices concurring."

This opinion will appear in 6 Kan., which is not in the state law library, and we regard it as clearly in point in the case now in judgment. There was no contract between the parties to this suit, and the company had no right to compel the commissioners to do a thing, the result of which the company would not be bound to accept. If the money had been collected, and the commissioners had offered to take stock and pay for it with the money at par, the railroad company would not be bound to receive the money and deliver the stock; nor would the company have done so, if the stock had risen largely above par. Rights and duties, both in morals and law, are correlative; and he who claims a right must be bound by a duty. As the company was under no legal obligation to receive the money and give stock for it, she could not compel the collection or payment over of the money when collected.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer to the complaint.

C. Denby, for appellant.

Falkner et al. v. Colshear et al.

FALKNER ET AL. v. COLSHEAR ET AL.

MECHANIC'S LIEN.—Recording Notice.—Notice of intention to hold a mechanic's lien must be recorded in a book kept for that purpose. Recording the notice in the mortgage record is a nullity.

SAME.—Married Woman.—Where a married woman is the owner of real estate in her own right, and the proper steps have not been taken to create a mechanic's lien, in the absence of any contract made by her for the making of improvements thereon, and in the absence of evidence showing that the improvements made were necessary to the full and complete enjoyment of her separate property, neither she nor her real estate can be held liable for the making of such improvements.

APPEAL from the Ripley Circuit Court.

BUSKIRK, C. J.—This was an action by the appellees against the appellants, to enforce a mechanic's lien upon the separate real estate of Mrs. Sarah L. Falkner, for work done in the erection of a house and other buildings thereon.

Numerous errors have been assigned by the appellants, but we shall only find it necessary to examine one of them, as the motion for a new trial presents for our decision a question which is vital and decisive of the right of the plaintiffs to recover in this action.

There was issue; trial by court; finding for the plaintiffs; motion for a new trial; motion overruled; and proper exceptions. The evidence is in the record by a bill of exceptions.

The land upon which the house and other buildings were erected was owned and held as the separate property of Mrs. Falkner. The contract for the buildings was made by Chester R. Falkner with Louis L. Kelley, by which Kelley agreed to erect certain buildings for an agreed sum. There is no evidence tending to show that Mr. Falkner was acting as the agent of his wife, or that Mrs. Falkner was in any event to be liable for the sum agreed to be paid, or that any charge was to be created on her separate estate. The appellees were employed by Kelley. Falkner paid Kelley the entire amount agreed to be paid, and for some extra work. The appellees did not serve any notice on Falkner, that they intended to hold him personally liable, under section 649 of

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the code, as amended by the act of March 11th, 1867. 3 Ind. Stat. 335.

It is claimed by the appellees, that Chester R. Falkner agreed to pay their wages from a certain specified time, but as no personal judgment was rendered against Falkner, no question arises in the record for our decision on this point.

Within proper time after the completion of the work, the appellees filed in the recorder's office notices of intention to hold a lien on said property. The notices were recorded in the record of mortgages. It is provided by section 650 of the code, as amended in 1867, that notice shall be filed in the recorder's office of the intention to hold a lien, and that "the recorder shall record the notice, when presented, in a book to be kept for that purpose, for which he shall receive twenty-five cents." 3 Ind. Stat. 336.

It was shown upon the trial that the recorder of said county had procured, and had in his office, at the time the notices in this case were presented, a book known as a "Mechanic's Lien Record." The recording of the notices in the mortgage record was a nullity. There can be no lien unless the notices were recorded. *Millikin v. Armstrong*, 17 Ind. 456, and cases there cited.

The following judgment was rendered by the court: "It is therefore considered by the court that the plaintiff, Wm. H. Colshear, recover said sum of thirty-four dollars and fifteen cents, as also his costs; that said William Stegner recover said sum of twenty-six dollars, as also his costs; and that said real estate above described be sold on an order of sale to be issued herein, as other lands are sold on execution, to satisfy said judgment, interest, and costs."

The above judgment cannot be sustained. There was no personal judgment against Chester R. Falkner, and, of course, no personal judgment could have been rendered against his wife. Mrs. Falkner was the owner, in fee, in her own right, of the real estate upon which the improvements were made. There are at least three modes in which the separate property of a married woman may be encumbered; first, by a deed in

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which her husband joins; second, where she has made a contract for the erection of buildings thereon, and the proper steps have been taken to enforce a mechanic's lien; third, where a married woman has made an express contract for the making of improvements on her separate property, which improvements were necessary to the full and complete enjoyment thereof, and where it was expressly indicated by her that she intended to charge her separate property, and where the other contracting party made the contract looking to, and relying upon, such separate property.

There was no deed in which her husband joined. The proper and necessary steps were not taken to create or enforce a mechanic's lien. There was no contract made by Mrs. Falkner for the making of said improvements. There was no evidence showing that the improvements made were necessary to the full and complete enjoyment of her separate property. *Kantrowitz v. Prather*, 31 Ind. 92; *Lindley v. Cross*, 31 Ind. 106; *Hasheagen v. Specker*, 36 Ind. 413; *Capp v. Stewart*, 38 Ind. 479. The court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions for further proceedings in accordance with this opinion.

E. P. Ferris and H. T. Lippard, for appellants.

W. D. Willson and T. E. Willson, for appellees.

TEMPLE ET AL. *v. LASHER.*

PRACTICE.—Assignment of Error.—An assignment that the court erred in excluding the evidence of a certain witness raises no question, where there is no general assignment that the court erred in overruling a motion for a new trial, and there is an assignment of error in refusing to grant a new trial placed on other specific grounds only; although the exclusion of the evidence was mentioned in the motion as a reason for a new trial.

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MOTION FOR NEW TRIAL.—*Misconduct of Jury.*—A motion for a new trial on the ground of misconduct of the jury, if not supported by affidavit, is properly disregarded.

APPEAL from the Perry Common Pleas.

DOWNEY, J.—Action by the appellee against the appellants on a promissory note, and for work and labor, money paid, and goods sold and delivered, there being in the complaint a count on the note, and another for the other causes of action. The defendants pleaded a general denial, and there was an agreement that under the issue thus formed, all matters might be given in evidence. There was a trial of the cause by a jury, and a verdict for the plaintiff for three hundred dollars on the note, and fifteen dollars on the account. A motion made for a new trial by the defendants was overruled, and final judgment rendered on the verdict.

The defendants appealed and have here assigned errors as follows: first, excluding the evidence of the witness Andrew Miller; second, in overruling the appellants' motion for a new trial on the ground of the misconduct of the jury that tried the cause; third, in overruling the motion of appellants for a new trial on the ground that the verdict of the jury is not sustained by sufficient evidence; fourth, in overruling the motion for a new trial on the ground that the verdict of the jury is contrary to law.

There is no general assignment that the court erred in overruling the motion for a new trial. The first assignment of error raises no question. Nor can we examine the question whether the testimony of Miller was or was not properly excluded. Although the exclusion of his evidence is mentioned as a reason for a new trial, the refusal to grant a new trial, except on other grounds, is not assigned for error. *Smith v. Crigler*, 29 Ind. 516; *Whitinger v. Nelson*, 29 Ind. 441; *Herrick v. Bunting*, 29 Ind. 467; *The Bellefontaine R. W. Co. v. Reed*, 33 Ind. 476.

The allegation with reference to the misconduct of the jury was not supported by affidavit in the court below, as required by the code (2 G. & H. 215, sec. 355), and hence

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was properly disregarded by the common pleas, as it must be by us.

The facts of the case, as disclosed by the evidence, do not warrant us in disturbing the judgment in the common pleas. The evidence as to whether there was or was not a warranty of the boat, which was the ground of defence, was quite contradictory. That question must remain as settled by the jury.

The judgment is affirmed, with costs.

S. K. Wolfe, for appellants.

E. R. Hatfield, W. H. Peckinpaugh, and J. B. Black, for appellee.

GLASS ET AL. *v. THE STATE.*

RECOGNIZANCE.—*Suit on.—Criminal Courts.*—An action cannot be commenced against the bail upon a forfeited recognizance, until after the adjournment of the term of court at which the forfeiture occurred; and this rule applies to criminal courts, that hold but two terms in each year.

APPEAL from the Jefferson Common Pleas.

WORDEN, J.—Samuel Rea was indicted in the criminal court of Jefferson county for a felony, and entered into a recognizance for his appearance in that court on the 14th of November, 1870, to answer the charge, with George Glass as his surety. On the non-appearance of Rea, the recognizance was duly declared forfeited by order of the proper court.

This suit was commenced on the recognizance against both the principal and surety, on the 8th of December, 1870. The recognizance was taken on the 17th of September, 1870, and during the July term of the criminal court for that year.

The question is raised, whether the action was not prematurely brought. It appears by an answer filed, to which a

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demurrer was sustained, that when the action was commenced, the July term of said criminal court had not ended, but that the court was still in session as a part of the July term aforesaid.

The act organizing the criminal court of Jefferson county provides that it shall sit on the first Mondays in January and July of each year, "and shall hold for six months if the business require it." 3 Ind. Stat. 176, sec. 2.

Sec. 47, 2 G. & H. 398, provides for declaring a recognizance forfeited. The next following section provides, that the prosecuting attorney may, at any time after the adjournment of the court, proceed by action against the bail upon the recognizance.

Under this statute, an action cannot be commenced against the bail until after the adjournment of the court at which the recognizance is declared forfeited. The forfeiture might be set aside during the term, and perhaps afterward, on good cause shown; and, indeed, the bail may surrender his principal at any time before final judgment against himself on the recognizance, and on payment of costs be discharged from all liability thereon. Sec. 44.

The creation of criminal courts with six-month terms was probably not contemplated when the above cited provision was enacted; and some legislation may be needed to prevent long delay in bringing suits in some cases upon forfeited recognizances. But if this be so, it is not matter of surprise. No new system in law is perfect in its inception. Time and experience only can develop its imperfections and indicate the needed amendments. We leave the matter in the hands of the legislature, and hold that under the law, as it now stands, an action cannot be commenced against the bail upon a forfeited recognizance until after the adjournment of the court at which the forfeiture was declared.

The court below erred in sustaining the demurrer to the answer in question.

The judgment below is reversed, and the cause remanded.

F. Y. Allison and *W. T. Friedley*, for appellants.

B. W. Hanna, Attorney General, for the State.

Sanders v. Sanders et al.

SANDERS v. SANDERS ET AL.

PLEADING.—Answer.—Demurrer.—An answer which assumes to answer the entire cause of action, but which answers only a part, is bad.

APPEAL from the Henry Common Pleas.

BUSKIRK, C. J.—The only question presented by the record is, whether the court erred in overruling a demurrer to the fourth paragraph of the answer.

This was a claim filed by Uxum Sanders, the appellant, against the estate of Joseph Sanders, deceased. The claim consisted of various items for work and labor done and performed by the appellant for the deceased, and extended from July 5th, 1862, to February 20th, 1870. The aggregate amount of the items was one thousand seven hundred and seventy-nine dollars and seventy-three cents, and the credits amounted to the sum of four hundred and fifty-one dollars and forty-nine cents, leaving a balance due of one thousand three hundred and twenty-eight dollars and twenty-three cents.

The executors refused to allow the claim, but filed an answer thereto. The appellant demurred to the fourth paragraph of the answer. The court overruled the demurrer, and the appellant refusing to plead further, the court rendered judgment for the appellees, to all which rulings the appellant excepted, and prosecutes this appeal and seeks a reversal of the judgment for the alleged error of the court in overruling the demurrer to the said fourth paragraph of the answer.

The fourth paragraph of the answer reads as follows:

“4. That in September, 1864, the said decedent executed and delivered to the said plaintiff, and Wright Sanders, and Arthur Sanders, a deed of conveyance, a copy of which is filed herewith, conveying to them the premises therein described, in consideration that the grantees therein should keep, support, and maintain the said Joseph Sanders during his lifetime, and that the several claims and items sued on

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are for keeping, maintaining, and supporting said Sanders, and for no other cause or account; and that the said grantees, at the time, to wit, in the lifetime of said grantor, and at the time of the execution of said deed, took possession of said premises, and have ever since that time occupied the same under the said title deed; wherefore, the defendants say they are not indebted in any sum to said plaintiff."

The deed referred to in the above answer was from Joseph Sanders to Wright Sanders, Arthur Sanders, and Uxum Sanders, who are described as the children of the grantor, and conveyed certain lands therein described upon the terms and conditions therein contained, and in consideration of natural love and affection. The conditions are as follows: "That said grantor is to have the control and management of said real estate and the proceeds of the rent thereof during his lifetime, and that said grantees shall not, in any way, convey or encumber said real estate during his, the said grantor's, lifetime; that said grantor is to reside and live on said farm at his option and pleasure; the said grantees are not to have possession of said real estate conveyed by this deed, as under this deed, during the lifetime of said Joseph Sanders, except as may hereafter be agreed upon by said parties; said grantees are to take good care of said grantor, support and maintain him out of the proceeds of such farm during his life. If said grantees shall, in any respect, violate or neglect any of the conditions and terms above stated, then this deed to be void, and the said land to reinvest in said grantor."

We are of the opinion that the court erred in overruling the demurrer to the fourth paragraph of the answer. The facts set up therein were pleaded in bar of the entire cause of action. The facts, as they were pleaded, did not constitute a bar to the entire cause of action. The first item in the claim was on the 5th of July, 1862. The deed was executed on the 19th of September, 1864. Between these two dates, the items in the account amount to about three hundred dollars.

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The substance of the answer is, that the appellant should not recover, because the work done and services rendered were done and performed under the contract contained in the deed. But there is no allegation in the answer that there was any agreement, other than that set up in the deed, for the support of the decedent; nor is it averred that the work which had been done prior to the execution of the deed constituted any part of the consideration or inducement to such deed, or that such work was to be compensated for by the conveyance of the farm. The contract set out in the deed was prospective, and there is no averment that it was to have any retroactive operation. As the answer assumes to answer the entire cause of action, and fails to do so, it was bad.

For this error, the judgment must be reversed. There are other defects in the answer, but these can be obviated when a new answer is prepared.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the fourth paragraph of the answer, and for further proceedings in accordance with this opinion.

E. H. Bundy and F. T. Mellett, for appellant.

M. E. Forkner, F. Brown, and R. L. Polk, for appellees.

DORSCH ET AL. v. ROSENTHALL.

PRACTICE.—*Motion for New Trial.*—In a suit upon a note and to foreclose a mortgage, where a new trial was asked for alleged error in receiving in evidence a note differing from the note described in the mortgage, the motion, if held, should have pointed out in what particular the difference existed.

SAME.—*Foreclosure.—Variance.*—In a suit to foreclose a mortgage, if a note is filed with the complaint, and alleged to be the same note mentioned in the

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mortgage, and it is proved on the trial to be such, this will cure a defective description of the note in the mortgage.

SAME.—*Motion for New Trial.*—A motion for a new trial, on the ground of receiving improper evidence, or excluding proper evidence, must call the attention of the court to the particular improper evidence admitted, or the particular proper evidence offered and rejected.

SAME.—*Court.—Term.*—If a trial is in progress at the time when by law the term of the court would expire, the term shall be deemed to extend to the close of the trial.

APPEAL from the Howard Common Pleas.

PETTIT, J.—This suit was brought by the appellee against Ferdinand Dorsch and Maria Dorsch, his wife, to obtain judgment on certain promissory notes against him, which had been given for real estate which had been conveyed to Maria, his wife, and against her to foreclose the mortgage which had been given to secure the payment of the notes, being the purchase-money; and against James W. Robinson and Alice, his wife, Robinson having purchased the fee simple from Dorsch and wife after the mortgage was given.

Issues were formed, to which no exceptions were taken, however bad they may have been. Trial by the court, finding for appellee in the proper sum, and for foreclosure, sale, etc. Motion for a new trial overruled, and exception and judgment on the finding. There are many assignments of error in form, but none in law, except the overruling of the motion for a new trial.

The causes for a new trial are,

“First. That the court erred in receiving in evidence the notes of F. Dorsch, in support of the complaint, they being a different set of notes from the notes described in the mortgage.”

This cause is not sufficiently specific. It should have pointed out in what particular the supposed defence existed. The mortgage and notes are made parts of the complaint, and were filed with it; and we have carefully compared them, and there is no legal difference between the notes and their description in the mortgage. But if the notes were not perfectly described in the mortgage, they were filed with

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the complaint and alleged to be the same; and this would explain and cure any imperfection in their description in the mortgage, especially as two witnesses, one the notary public who made out all the papers, and the other having had their custody for a long time, swore positively that they were the notes given for the real estate, and to secure the payment of which the mortgage was executed.

"Second. The court received improper evidence on the part of the plaintiff.

"Third. The court erred in rejecting proper evidence offered by the defendant." →

These causes are not sufficient. They should point out, and call the attention of the court to, the particular improper evidence admitted, and the supposed proper evidence offered and rejected by the court.

"Fourth. The finding of the court is not sustained by the evidence."

"Fifth. The finding and judgment are contrary to law and the evidence."

The evidence and the law have both been examined by us, and they not only warrant, but demand, the finding and judgment. The sixth, seventh, and eighth causes are mere repetitions of the foregoing causes, and are fully answered above.

"Ninth. The judgment is void, it having been rendered by the judge of the court, after the September term of said court had expired, and done in vacation, and judgment and decree made after the term of said court had expired; was not signed by the judge of said court, which was made after the last day of said September term had expired, ever signed by said judge."

We have literally copied this cause for a new trial, and find it difficult to tell what is meant by it. In one branch it seems to complain that the order book was not signed by the judge before the motion for a new trial was made. This ought not and should not have been done. The transcript shows that as soon as the finding of the court was announced, the motion and causes for a new trial were filed, argued,

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overruled, and final judgment rendered. Here was an action of the court after the causes for a new trial were filed, and consequently they could not show as a cause for a new trial, that the final order was not signed by the judge. It was his duty to do it, and until the contrary appears, we shall presume he did his duty. The other branch of the cause for a new trial seems to raise the question of jurisdiction, the court having sat and rendered its judgment one day after the regular term had expired. The regular term expired on Saturday, October 24th, 1870. On that day this case was on trial, as the transcript shows all the evidence heard; but night coming on, the judge weary, and there not being time to finish the case, the judge adjourned from Saturday till Monday morning, and closed the case. This was clearly right. 2 G. & H. 27, sec. 32. "Whenever there is a trial begun and in progress at the time when by law the term of such court would expire, the term shall be deemed to extend to the close of such trial."

We believe there is no error, not even a technical one, in this record, that we have been able to see. Sure we are that the substantial rights of the parties have been fully protected. See 2 G. & H. 122, sec. 101.

The judgment is affirmed, at the costs of the appellants.

J. W. Robinson, for appellants.

M. Bell and A. S. Bell, for appellee.

39	212
134	76

39	212
171	48

GORDON ET AL. v. SWIFT.

PLEADING.—*Demurrer*.—A demurrer to an answer, assigning for cause, that the answer, "as a defence to plaintiff's cause of action, is not sufficient in law," is bad under the statute.

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—The appellee sued the appellants, alleging in his complaint that John Gordon, Sr., John Gordon, Jr., and

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Helen L. Gordon executed to him a promissory note, and that John Gordon, Jr., and Helen L. Gordon executed to him a mortgage on certain real estate to secure the payment of the note. There was a prayer for judgment for four thousand dollars, the foreclosure of the mortgage, and for judgment against John Gordon, Sr., and John Gordon, Jr., for any amount not made by the sale of the mortgaged premises. One Ferstegge was made a defendant, because he had, or claimed to have, a lien on or claim to the mortgaged premises, acquired by him subsequent to that of the plaintiff.

The defendants all united in an answer to these paragraphs, and John Gordon, Sr., and John Gordon, Jr., pleaded an additional paragraph of answer, in which the other defendants did not join.

The first paragraph set up a counter claim, growing out of an alleged warranty of the personal property, the sale and delivery of which were the consideration of the note on which the suit was brought, and a breach of such warranty, by which it was alleged there had been a failure of the consideration of the note in part.

The second paragraph alleged a want of consideration.

The third paragraph was like the first, with this difference, that it set out a written warranty of the goods.

The fourth, which was pleaded by the two Gordons, relied upon a set-off growing out of the breach of the same warranty.

The plaintiff demurred to the first, third, and fourth paragraphs of the answer. The cause assigned in the demurrer to the first paragraph was, "that the said paragraph is not a sufficient defence in law to plaintiff's complaint."

The cause assigned in the demurrer to the third paragraph is, "that the said third paragraph, as a defence to plaintiff's cause of action, is not sufficient in law."

And the cause assigned in the demurrer to the fourth paragraph of the answer is, "that the said fourth paragraph, as a defence to plaintiff's cause of action, is not sufficient in law."

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The court sustained the demurrers, and the defendants excepted. A reply in denial of the second paragraph was filed, and there was a trial of the cause by the court, and finding and judgment for the plaintiff.

The errors assigned are, the sustaining of the demurrers to the first, third, and fourth paragraphs of the answer.

It is urged by counsel for the appellee, that the answers were bad, for the reason that the property for which the note was given was sold by the appellee to the firm of Gordons and Martin; that the note was executed by John Gordon, Sr., and John Gordon, Jr., two members of that firm, and Helen L. Gordon, as their surety, and that the appellants could not set up the warranty and breach of it, because the damages or right of action therefor belonged to the firm of Gordons and Martin, and not to these defendants, or to John Gordon, Sr., and John Gordon, Jr.

Upon examination of the causes of demurrer, as they appear in the record and are above set out, we do not find that there was any objection made on account of a defect of parties. See *Allen v. Ferauld*, 31 Ind. 372. Indeed, we think none of the demurrers set out any legal cause or ground of demurrer. They state none of the causes enumerated in the code for demurring. See *Kemp v. Mitchell*, 29 Ind. 163; *The Cincinnati, etc., R. R. Co. v. Washburn*, 25 Ind. 259; *Tenbrook v. Brown*, 17 Ind. 410; *Hicks v. Reigle*, 32 Ind. 360.

The court should have overruled the demurrers, because they did not assign any of the statutory causes for demurring. 2 G. & H. 77, sec. 50.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrers, and for further proceedings.

G. V. Howk and W. W. Tuley, for appellants.

D. C. Anthony, for appellee.

Doffin v. Guyer.

THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN R. W. CO.
v. THE BOARD OF COMMISSIONERS OF FOUNTAIN CO.

APPEAL from the Fountain Circuit Court.

BUSKIRK, C. J.—The question involved in this case is the same that was involved, considered, and decided, by this court, in the case of *Garrigus v. The Board of Commissioners of Parke County*, *ante*, p. 66; and on the authority of that case, the judgment in this must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint.

J. McCabe and G. McWilliams, for appellant.

J. R. Coffroth and T. B. Ward, for appellee.

DOFFIN v. GUYER.

EVIDENCE.—*Stamp*.—An objection to the introduction in evidence of a written contract, on the ground that the United States revenue stamp required by law affixed thereto was cancelled only with the initials of the party signing the contract, without the date, was properly overruled.

39	815
136	538
39	215
140	383

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellant, founded on a contract in writing, by which the appellant bound himself to pay the residue of a designated sum, after applying the proceeds of certain personal property thereto. Issues were formed; there was a trial by jury; verdict for the plaintiff; a motion for a new trial made by the defendant overruled, and judgment on the verdict.

The only question made in this court is, that the common pleas erred in admitting in evidence the instrument on which the action is founded. The objection to its admissibility,

Stevenson v. Ennis.

made by counsel for the appellant, was, that it is not duly stamped, and the stamp properly cancelled. The required stamp was affixed, but it was cancelled only with the initials of the party, without the date. This objection was properly overruled. See *Adams v. Dale*, 29 Ind. 273. Other cases have since been decided by this court, holding that a stamp was not necessary to the validity of the contract.

The judgment is affirmed, with five per cent. damages and costs.

J. A. Stein, for appellant.

H. W. Chase and J. A. Wilstach, for appellee.

STEVENSON v. ENNIS.

Costs.—Court of Common Pleas.—Recovery of Less than Fifty Dollars.—In an action on an implied assumpsit, commenced in the common pleas, the plaintiff recovered forty-two dollars, the amount claimed by him not having been reduced by counter claim or set-off.

Held, that the plaintiff was liable for costs.

APPEAL from the Wayne Common Pleas.

WORDEN, J.—Action by the appellant against the appellee, on an implied assumpsit for the pasturage of certain cattle. Answer of general denial, and two special paragraphs, neither of which was a counter claim or set-off. Verdict and judgment for the plaintiff for forty-two dollars. Judgment was rendered against the plaintiff for costs, the action having been commenced in the common pleas, and from that judgment he appeals and seeks a reversal in respect to the costs.

On the trial, the plaintiff's testimony made out a case apparently entitling him to a little over fifty-one dollars, but the defendant's evidence had a tendency to show that the fences around the land, on which the cattle were pastured, were bad, and that the cattle at times escaped therefrom, and hence, that the cattle were not really pastured by the plain-

Knaube *et al.* v. Kerchner.

tiff as long as his evidence tended to establish. This evidence was competent under the general denial, as it tended to reduce the time of the claimed pasturage of the cattle.

The jury found there was due to the plaintiff for the pasturage forty-two dollars. The amount claimed by the plaintiff was not reduced by counter claim or set-off. Under these circumstances, we think it quite clear that the plaintiff was liable for costs, and that the judgment below should be affirmed. 2 G. & H. 227, sec. 397.

The judgment below is affirmed, with costs.

J. Railsback and *A. B. Young*, for appellant.

W. A. Peelle and *H. C. Fox*, for appellee.

KNAUBE ET AL. v. KERCHNER.

MECHANIC'S LIEN.—*Pavement*.—The making of a pavement, in front of a lot and abutting thereon, cannot be regarded, in any sense, as the "construction or repair" of a building on such lot, within the meaning of the statute in regard to mechanics' liens; and therefore a mechanic's lien cannot be acquired for work done and materials furnished in the construction of such a pavement.

APPEAL from the Jennings Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellants, to enforce a mechanic's lien, and there was judgment in the circuit court for the plaintiff, from which the defendants appeal to this court. The errors assigned are, the overruling of a demurrer to the complaint, and the refusal to grant a new trial.

We need only examine the first error assigned. The question involved is this, as stated in the brief of counsel for the appellee: "Will a mechanic's lien attach for work done and materials furnished in the erection and construction of a pavement in front of, and abutting upon, a lot and

The Toledo, Wabash, and Western Railway Company *v.* Cory.

building, as in this case?" The statute provides that mechanics and all persons performing labor or furnishing materials for the construction or repair of any building may have a lien. 2 G. & H. 298, sec. 647. We cannot regard the making of a pavement in front of a lot as, in any sense, either the construction or repair of a building, within the meaning of the statute, and must, therefore, hold that the demurrer to the complaint should have been sustained.

The judgment is reversed, with costs, and the cause remanded.

J. D. New and A. G. Smith, for appellants.

J. Overmeyer and D. Overmeyer, for appellee.

THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY *v.* CORY.

RAILROAD.—Killing Cattle.—Negligence.—In an action against a railroad company for the killing of cattle by the cars, where the suit is founded on the statute, and the liability of the company is based solely on a failure to fence the track, the question of contributory negligence does not arise; and if cattle are killed or injured at a point on the railway where the company could lawfully fence the track, and it was not fenced, the company is liable.

SAME.—In such action, the question, whether the railroad company has securely fenced the track, is a question of fact, to be determined by the jury.

APPEAL from the Wabash Circuit Court.

BUSKIRK, C. J.—This was an action by the appellee against the appellant, to recover the value of two cows, which it was alleged had been killed on the track of appellant's road, by an engine and train of cars.

The appellant demurred to the complaint, upon the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted.

The Toledo, Wabash, and Western Railway Company v. Cory.

The appellant answered in four paragraphs. The appellee replied by a denial to the second, third, and fourth paragraphs of the answer.

There was a trial by a jury; verdict for appellee; motion for a new trial made, motion overruled, and an exception taken.

The first error assigned involves the correctness of the ruling of the court in overruling a demurrer to the complaint. The complaint, omitting the formal parts, was as follows:

"Plaintiff complains of defendant, and says, that heretofore, to wit, in the month of August, 1865, a part of defendant's road and road bed was situated in section 9, township 27, north of range 6 east, in Wabash county, Indiana, and that a portion or parcel of land in said section, lying adjacent to said road and road bed, which the defendant of right could, and by law should, have fenced, but which was not fenced, and was knowingly and wilfully left unfenced by said defendant; and that in consequence of the negligence of said defendant in not fencing said part of said road, the plaintiff's cattle, to wit, two cows of the value of one hundred dollars each, went on said road of defendant, and were then and there fatally injured by being struck and knocked from the track of said road by defendant's locomotive and cars, to the great damage of said plaintiff, to wit, two hundred dollars; and the plaintiff demands judgment for that sum, and other proper relief," etc.

The learned counsel for appellant virtually concedes that the complaint is good, but suggests whether it should not be more particular as to the failure to fence. We think the complaint was good. *The Toledo and Wabash Railway Company v. Lurch*, 23 Ind. 10; *The Toledo, Wabash, and Western Railway Company v. Weaver*, 34 Ind. 298.

The court committed no error in overruling the demurrer to the complaint.

It is next assigned for error, that the court erred in overruling the motion for a new trial. Several reasons are

The Toledo, Wabash, and Western Railway Company *v.* Cory.

assigned in support of this assignment of error. The first is, that the court erred in refusing to instruct the jury as requested by the appellant. The appellant requested the court to give the jury ten instructions. The court gave all of the instructions, as requested, except the sixth and tenth, which were given with modifications. The appellant excepted to the refusal to instruct, as requested, and to the giving of the sixth and tenth as modified.

The sixth instruction, as asked, was as follows:

"6. If Cory allowed his cows to run at large in the night, without anything to hinder them from getting on to the track of the railroad at the highway crossing, when he knew the railroad to be in operation day and night, this would be such negligence on the part of the plaintiff as would amount to (a reckless disregard of their life, and be) a complete bar to his recovery."

The court gave the instruction except the words in parenthesis which were refused.

There was no error committed by the court, in refusing to give to the jury the words in parenthesis. They did not express any principle of law, but suggested a reason for the principle of law enunciated in the residue of the instruction. The court should have refused to give the entire instruction. As applied to this case, it did not contain the law. This action was founded upon the statute, and the liability of the railway company was based solely upon its failure to securely fence the railroad track, at the point where the cattle entered thereon. In such an action, the question of contributory negligence does not arise. The question has been considered and decided by this court, as at present constituted, in three cases that we now remember, and there may be others. It should no longer be regarded as an open question. *The Toledo, Wabash, and Western Railway Company v. Weaver*, 34 Ind. 398.

The counsel for appellant, in his brief, admits that the court committed no error in modifying the tenth instruction.

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The following instructions were given by the court on its own motion, viz.:

"1. If the animals were killed or injured, as alleged, at a point on the railway where the defendant could lawfully fence the same, and which at that point was not fenced, defendant is liable.

"2. If the animals were killed or injured, as alleged, at a point where a public highway crosses the railway, the defendant at such point could not lawfully fence the same, and in such case is not liable.

"3. Whether there was a crossing at that point where the alleged injury, if any, occurred, and whether the defendant established cattle-guards and maintained a proper fence at that point, taking into view the character of the crossing, nature of the ground, etc., are questions of fact for the jury to determine, according to the evidence as applied to the circumstances of the case."

It is maintained by the appellant that the court erred in giving the first and third of the above instructions. There can be no question as to the correctness of the first instruction. The authorities referred to by us in reference to the sixth instruction fully support the instruction given.

The position assumed by the counsel for the appellant in reference to the third instruction is stated in these words:

"Hence, also, the vice of the third instruction given on the court's own motion. There was no conflict of evidence about the crossing, or the injury, or the kind and position of the cattle-guards as put in. These facts were not controverted. The company had built fences and put in cattle-guards, and maintained them securely. It was for the court, and not the jury, to declare the law arising on what the company had done, by instructing the jury that the acts of the company at this crossing, as to the position of the east cattle-guard, was or was not in conformity to the statute."

Is it a question of fact to be determined by the jury from

Buck *v.* Rodgers.

the evidence, or a question of law to be decided by the court, whether the appellant had securely fenced its road? We entertain no doubt that it was a question of fact to be determined by the jury from the testimony of the witnesses, under the instructions of the court as to the law. The real and substantial question involved in the action was, whether the company had securely fenced its road. That question was submitted to the jury, and the court had no power to withdraw it from the jury. It was for the court to tell the jury whether under the law the appellant was required to fence the road at the point where the cattle entered upon the track, but it was a question of fact, to be determined by the jury from the testimony of witnesses, whether the railroad company had fenced its track in such a manner as to prevent cattle from entering thereon. The third instruction contained the law, and was eminently proper.

It is next claimed by the appellant that the verdict was not sustained by sufficient evidence.

We think otherwise. We are of the opinion that the negligence of the appellee, in permitting his cattle to run at large, did not relieve the railroad company from its liability under the statute. In this view, the verdict was fully supported by the evidence.

The judgment is affirmed, with costs.

W. Z. Stuart, for appellant.

39 223
126 24

BUCK *v.* RODGERS.

LANDLORD AND TENANT.—Repairs.—Measure of Damages.—Where a landlord agreed with his tenant that he would deliver sufficient rails to repair the fences, so as to protect the crops on the farm, and the tenant sued to recover

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for a breach of such contract, alleging that, by reason of the breach, his crops were damaged, and the evidence did not show any want of diligence on the part of the tenant to protect his crop, notwithstanding the insufficiency of the fences, it was not error to instruct the jury that the damages of the plaintiff were not measured by the difference between the rental value of the farm as it was, and as it should have been according to the contract; and that the tenant might have repaired the fence and charged the cost to the landlord, if the latter did not furnish the rails within a reasonable time, but that if he, in good faith, waited for the landlord to furnish the rails, he could recover the damages actually sustained.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant, commenced before a justice of the peace. The complaint alleged, in substance, that the plaintiff rented from the defendant a certain farm for the term of one year, at a rent of three hundred dollars, which the plaintiff paid to an assignee of a note given by the plaintiff to the defendant therefor; that the defendant agreed to haul and deliver rails sufficient to repair the fences, so as to protect the crops on the farm, but that he failed to do so, whereby the crops were left unprotected, and the plaintiff was damaged to the amount of one hundred and twenty-five dollars, etc.

The plaintiff recovered a judgment for one hundred and twenty-five dollars before the justice, and on appeal to the common pleas by the defendant, a like recovery was had in that court.

Two questions are made in the cause, viz., whether the verdict (the cause having been tried by a jury) was sustained by the evidence, and whether the court erred in giving a certain instruction.

We are quite clear in the opinion, that the judgment below ought not to be disturbed on the evidence. The verdict is well sustained by the evidence, and seems to us to be in accordance with its weight.

The charge complained of is as follows:

“Upon the question of the measure of damages, if you should find for the plaintiff, I will say that the difference between the rental value of the farm as it was, and as it

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should have been, according to the contract, is not the measure of damages. The plaintiff might have repaired the fence and charged the expenses to the defendant, if the defendant did not furnish rails, according to his contract, in a reasonable time; but if he, in good faith, waited for the defendant to furnish the rails, he can recover the damages he has actually sustained. Of course, this instruction is not applicable to the case, if you find that the defendant performed his contract, either according to its letter or to the satisfaction of the plaintiff."

The objection made to the charge may be best stated in the language of the counsel for the appellant. They say in their brief: "It places no obligation upon the plaintiff whatever, to make the slightest effort to save or protect his crop, but makes it optional with him to release himself from anything of the kind. He might stand by and see his crop destroyed, let the damages be great or small, and be fully indemnified under his contract, in default of the defendant furnishing the full amount of rails required."

If the evidence in the cause, which is set out in a bill of exceptions, showed any want of diligence on the part of the plaintiff to protect his crop, notwithstanding the insufficiency of the fences, the objection urged to the charge would deserve careful consideration. But the reverse is very clearly shown by the evidence. The plaintiff seems to have done all that could be reasonably required of him, to protect his crops, if not more than the law would absolutely have required under the circumstances.

The plaintiff testified that when the time came for plowing, he went to work upon the farm, supposing that the rails would be furnished, as agreed, before the crops would be endangered from stock. It is quite apparent that sufficient rails were not furnished to repair the fences. Stock began to break in and injure the crop. The plaintiff was required to watch the fields to keep out stock. Had he not done so, the crop would have been entirely destroyed. He estimates the time spent in watching the fields day and night, and

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driving out cattle, to be of the value of fifty dollars. He kept his son out of school for that purpose. He says that at the time the cattle began to break in, he had no rails of his own, or means to buy them, or time to haul them without neglecting his crop. A Mr. Cole, a credible witness apparently, testifies that cattle broke in and destroyed some of plaintiff's corn; saw him turn them out frequently. He turned them out one night in a storm, in which the witness says he would not have been out for fifty dollars.

Under these circumstances, the objection to the charge cannot prevail. As applied to the case made by the evidence, the charge, if not strictly correct as a general proposition, worked no harm to the plaintiff. Indeed, we think it may be said, that as applied to the case made by the evidence, the charge was correct.

The judgment below is affirmed, with costs.

H. D. Lee and P. H. Lee, for appellant.

C. A. Ray and F. M. Davidson, for appellee.

ARMSTRONG ET AL. v. KEIFER ET AL.

JUDGMENT.—*Equitable Interest in Land*.—To reach the equitable interest of a debtor in land, it is only necessary that the creditor should have obtained a judgment; while to reach personal property, both a judgment and execution are necessary.

SAME.—*Pleading.—Insolvency*.—In a suit on a judgment, to reach an equitable interest of the debtor in land, an allegation that the judgment defendant is insolvent is equivalent to a statement that he has no personal property subject to execution.

APPEAL from the Hendricks Circuit Court.

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Armstrong *et al.* v. Keifer *et al.*

DOWNEY, J.—This action was brought by the appellees, Augustus Keifer, Theresa Vinton, and John T. Warren, against the appellants, John S. Armstrong, Sarah C. Armstrong, and Robert M. Armstrong. The material facts alleged in the complaint are, that on the 13th day of July, 1870, the said John S. Armstrong and said John T. Warren, as partners, owned a drug store; that on that day, said firm purchased of the said Augustus Keifer and Theresa Vinton a bill of drugs, etc.; that in August, 1870, said John T. Warren sold out his interest in said stock of goods so owned by him and said John S. Armstrong to said John S. Armstrong and said Robert M. Armstrong, they, the said purchasers, agreeing to pay said debt to said Keifer and Vinton; that said purchasers failed to pay said debt, and on the 5th day of January, 1871, said Keifer and Vinton sued for the same, and on the 24th day of January, 1871, in the common pleas of Hendricks county, Indiana, recovered judgment therefor against Warren, Robert M. Armstrong, John S. Armstrong, and one James H. Faught, who, in some way not shown, had become liable; that at the time of incurring the said debt to Keifer and Vinton, and at the time said Warren sold out his interest in the drug store, said John S. Armstrong was the owner in fee simple of certain real estate described in the complaint; that on the 27th day of December, 1870, said John S. Armstrong, combining and colluding with said Robert M. Armstrong and Sarah C. Armstrong, the wife of said John S. Armstrong, and with the intent and for the purpose of cheating and defrauding the plaintiffs out of their debt, the said John S. Armstrong and wife conveyed said real estate to said Robert M. Armstrong, and he forthwith conveyed the same to said Sarah C. Armstrong; that said conveyances were without consideration, and to hinder, delay, and defraud the plaintiffs and other creditors out of their debts; that on the 25th day of January, 1871, the plaintiffs Keifer and Vinton caused an execution to be issued on the said judgment; that the defendants to said judgment are insolvent, and, without the property so fraudulently conveyed,

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they are wholly unable to pay said judgment. Wherefore, the plaintiffs ask the court to declare said conveyances fraudulent and void as to the plaintiffs, and to subject said real estate to sale for the payment of said judgment, and for general relief.

The defendants answered, first, general denial; second, that the said real estate is not subject to sale, for the payment of said judgment, because it is the separate property of said Sarah C. Armstrong; that the money, with which it was purchased and the improvements made on it, was her separate money; that said John S. or Robert M. Armstrong has not, and never had, any interest in the same; third, the third paragraph sets up more particularly her acquisition and ownership of the land.

The reply was a general denial of the second and third paragraphs of the answer.

The issues were tried by a jury, and there was a general verdict for the plaintiff, and also answers to interrogatories submitted to the jury, at the request of the defendants, as follows:

"1. Has John T. Warren any personal property subject to execution? Answer. Yes.

"2. Has James H. Faught any personal property subject to execution? Answer. No.

"3. Did the sheriff demand personal property in satisfaction of the judgment, which is the foundation of the plaintiffs' suit, of either John T. Warren or James H. Faught? Answer. No.

"7. Did the defendant John S. Armstrong promise to pay the firm debts of the partnership of Armstrong and Warren, at the time Warren sold his interest in the partnership property to Robert Armstrong? and if so, what was the consideration of that promise? Answer. Yes; consideration, the sale of John T. Warren's interest in the drug store to Robert M. Armstrong."

Also, the following, propounded by the court on its own motion:

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"9. Did Robert M. Armstrong and John S. Armstrong, in consideration of John T. Warren's retiring from the partnership, agree to pay the debt of the plaintiffs, Keiser and Vinton? Answer. Yes."

A motion was made by the defendants for a new trial, for the following reasons:

First. Because, on its own motion, the court wrote and propounded to the jury the above interrogatory number 9, without the request of either party.

Second. The verdict is not sustained by sufficient evidence.

Third. It is contrary to law.

Fourth. The court erred in admitting the testimony of John T. Warren to prove the promise of the defendant John S. Armstrong to pay the indebtedness of the partnership of Armstrong and Warren to Keiser and Vinton.

Fifth. In rejecting the evidence offered by the defendants to prove what was said by and between the parties who executed the deeds which are charged in the plaintiffs' complaint to be fraudulent.

Sixth. In refusing to instruct the jury as requested by the defendants.

Seventh. In giving charges five, six, and seven, as asked by the plaintiffs.

Eighth. In refusing to submit to the jury certain interrogatories asked by the defendants, and in striking the same out.

This motion was overruled, and the defendants excepted, but the evidence is not put in the bill of exceptions.

The defendants then moved the court to render judgment in their favor on the special findings of the jury; but this motion was also overruled, and they again excepted.

They then moved in arrest of judgment, on the ground of the insufficiency of the complaint. This motion, too, was overruled, and the proper exception entered.

The court then rendered final judgment on the verdict in favor of the plaintiffs, declaring the said deeds fraudulent and void, and the land subject to sale for the payment of the

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judgment of the said Keifer and Vinton, and ordering the sale of the same.

The errors assigned in this court present the following questions: First. Is the complaint sufficient? Second. Should the court have granted a new trial? Third. Should the court have sustained the motion for judgment on the special findings? Fourth. Should the court have sustained the motion in arrest of judgment?

We will consider these questions in their order.

First. The objection made to the complaint is, that the execution on the judgment was not returned *nulla bona*, before the suit was commenced, nor does it otherwise appear that the defendants had no personal property subject to execution. The insolvency, etc., of the defendants to the judgment is alleged, which, if that allegation be necessary, is equivalent to a statement that they have no property subject to execution. But the rule in such cases as this, as laid down in *O'Brien v. Coulter*, 2 Blackf. 421, is, that to reach the equitable interest of the debtor in land, it is only necessary that the creditor should have obtained a judgment; while to reach personal property, both a judgment and execution are necessary. See, also, *Kipper v. Glancey*, 2 Blackf. 356, and *Shirley v. Shields*, 8 Blackf. 273. Much is said in argument about Warren's being a plaintiff in this action, and it is suggested that the suit is carried on for his benefit. Warren had an interest in having the land made liable to the payment of the debt due to Keifer and Vinton. John S. and Robert M. Armstrong had promised to pay the debt and relieve him from his liability therefor. We think he had such an interest in the objects of the action as to make it proper that he should be joined as a plaintiff.

Second. Several questions are discussed, arising under the motion for a new trial: First. The propounding by the court of the ninth interrogatory to the jury, on its own motion, is the first. Whatever may be the law on this subject, it is clear that there is no reason here for reversing the judgment. It is conceded that neither the pleadings nor the evidence em-

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braced or presented the question decided by the jury in their answer to the interrogatory. The answer to it, therefore, could do no one any harm. Second. That the verdict is not sustained by the evidence. The evidence is not in the record, and, therefore, we cannot decide the question presented. Third. That the verdict is contrary to law. No question is made in this court upon this ground. Fourth. The bill of exceptions presents no question with reference to the testimony of Warren or its admissibility. Fifth. The rejection of the evidence, offered by the defendants, of what was said by the parties to the deeds, was correct. It is not shown by the bill of exceptions when the conversation took place, nor whether it related to the transactions in question or not. Sixth and seventh. We must presume that the charges given and those refused were correctly given and refused; since we do not know what facts were before the jury. Eighth. The court refused to submit to the jury several interrogatories which were asked by the defendants. We think they were immaterial, and, therefore, properly withheld from the jury. Some of them were based on the idea, that an execution on the judgment and a return of *nulla bona* thereon were necessary to enable the plaintiffs to recover. One was as to whether Robert M. Armstrong alone did not agree to pay the debt, in consideration of the sale of the interest of Warren in the drug store. John S. Armstrong was one of the parties originally liable for the debt of Keifer and Vinton; the judgment was against him with others, and he was therefore liable to Keifer and Vinton without reference to a promise made to Warren.

Third. There is no such inconsistency between the general verdict and the special findings as would require or allow the court to render judgment on the special findings for the defendants. The answer to the seventh interrogatory, that John S. Armstrong promised to pay the debt of Keifer and Vinton, is not inconsistent with the fact, that Robert M. Armstrong also agreed to pay, as alleged in the complaint. But perhaps this was not a material question, since Keifer

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and Vinton had obtained a judgment, and the object of this action was to subject the land to the payment of that judgment. John S. Armstrong had promised to pay the debt in the first instance, as one of the firm of Armstrong and Warren; and on the purchase of the interest of Warren, he again promised to pay it. As between him and Keifer and Vinton, he was bound to pay it, and as between him and Warren, he was bound to pay it, and save Warren harmless. As the jury found that the conveyances of the land to his wife were fraudulent, it seems to us just and proper that the land should be subjected to the payment of the judgment.

Fourth. As we have concluded that the complaint was sufficient, it follows that it is our opinion that the motion in arrest of judgment, based on the supposition that it was not good, was properly overruled

The judgment is affirmed, with costs.

F. V. Hadley and F. S. Ogden, for appellants.

L. Ritter, for appellees.

THE JEFFERSONVILLE RAILROAD COMPANY *v.* WEINMAN.

PRACTICE.—*Costs.*—Where the defendant in an action settles with the plaintiff, by payment, without any agreement as to costs, the defendant is liable for costs, at least to the date of the settlement.

APPEAL from the Floyd Circuit Court.

PETTIT, J.—The appellee sued appellant to recover damages done to his property, occasioned by the construction of her road in the city of New Albany.

After various motions, demurrers, answers, rulings, exceptions, and continuances, which, for the purposes of this cause, need not be further noticed, through the instrumentality of the appellant and the city of New Albany (the company paying to the city ten thousand dollars for the

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benefit of the appellee and others who had like suits pending), and "in consideration of seven hundred and thirty-seven dollars and ten cents paid by the city of New Albany and The Jeffersonville, Madison, and Indianapolis Railroad Company," the appellee gave a release to the city and the appellant for all damages occasioned by the construction of said road, dated May 25th, 1870, and at the next term moved the court to dismiss the cause, at the costs of appellant. To this the appellant objected, and by agreement of the parties, evidence, written and oral, was given to the court to enable it to determine how the case should be dismissed. On the evidence, the court dismissed the cause, at the costs of the appellant up to the 25th day of May, 1870 (the date of the release), and at the costs of the appellee after that date.

Exception was taken, and this ruling is assigned for error, a motion for a new trial on this point only having been made and overruled. The correctness of this ruling is the only question before us, all others having been cut off or disposed of by the dismissal of the case. We see no reason for distinguishing this from an ordinary cause where the issue is tried by the court. The evidence is conflicting and not clear, as to what was the agreement, expectation, or understanding of the parties, and, under a long-settled rule of this court, we cannot reverse. The reasons of the rule have so often been given that we need not repeat them. It is admitted in appellant's brief, "that if A. brings suit against B. for an alleged debt or demand, and after suit brought, B. should settle with A. for his alleged debt or demand, without any agreement as to the costs of suit, then, in such a case, and upon such a state of facts, B. should pay the costs of suit accrued, and the suit, if dismissed, should be dismissed at his costs."

We think that the court, from the evidence, might well and properly have found that the appellant, through its officers, agents, and the city of New Albany, settled with the

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appellee, and that the ruling was right, on the hypothesis of the above admission.

The judgment below is affirmed, at the costs of the appellant.

G. V. Howk, W. W. Tuley, and C. D. Howk, for appellant.

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APPEAL from the Floyd Circuit Court.

PETTIT, J.—This suit, in all legal aspects, is the same as the case of *The Jeffersonville Railroad Company v. Weinman*, *ante*, p. 231; and on the ruling in that case this is affirmed, at the costs of the appellant.

N. B.—See the opinion of Judge BICKNELL, appended to the brief of the appellee in this case.*

G. V. Howk, W. W. Tuley, and C. D. Howk, for appellant.
W. Bullitt, for appellee.

**WEINMAN ET AL. v. THE JEFFERSONVILLE RAILROAD COMPANY.*

BICKNELL, J.—These cases are submitted to the court upon the question, by whom shall the costs be paid?

The facts are these: the plaintiffs brought separate suits against the company, claiming damages for injuries to their property by the defendants, in running their trains through the city of New Albany; the suits were pending a long time, and were producing a great deal of disturbance and ill-feeling among citizens of New Albany, and politicians were beginning to make use of it. Applications were made to the city of New Albany to exercise her authority, if she had any, against the defendants, and at length applications on behalf of the city were made to the defendants, to induce them to pay a sum of money to be distributed among the plaintiffs, and to be by them received in satisfaction of their claims.

In response to these applications, the railroad company made the following proposal to the city: "We will pay into the city treasury ten thousand dollars, if, in consideration thereof, the city will covenant to protect and save us harmless from and against all claims for damage to real estate or improvements thereon, caused, or alleged to have been caused, by the location and construction of our road as now located and constructed in the city of New Albany."

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PRACTICE.—Motion to Strike Out.—Bill of Exceptions.—When the court sustains a motion to strike out a paragraph, the paragraph is no longer part of the record, unless made so by bill of exceptions.

TAXES.—Payment After Suit.—The payment of taxes, after the commencement of an action to replevy personal property seized by the treasurer for such taxes, cannot be given in evidence to sustain the action.

SAME.—Estoppel.—Such payment of taxes, without protest, after the bringing of the action of replevin, estops the plaintiff from denying that the taxes are legal.

APPEAL from the Madison Common Pleas.

BU SKIRK, C. J.—This was an action brought by the appellant against the appellees, to recover the possession of a

The city made the covenant above required, with the proviso, that if the claimants for damages should not execute sufficient releases of all damages to their real estate, present and prospective, growing out of the construction and lawful operation of said road within the city, then the covenant should be void, and the money returned by the city to the company.

The railroad company accepted the proviso and paid the money to the city. The plaintiffs executed the releases, and received their proportions of the money. The following is the form of the releases:

"I do hereby release said city and said railroad company from all claims and demands which I now have, or ever had, or which my heirs, executors, or administrators shall have to the date hereof, for damage to my real estate and appurtenances, by reason of the granting of the right of way by said city to said company to construct its road near my said real estate, and by reason of the construction and operation of said road by said company, by, near, along side of, and over, my said real estate and its appurtenances."

Meanwhile the suits have remained upon the docket; but the plaintiffs, having received their damages and given their releases, now propose to dismiss their suits, and somebody must pay the costs.

It is clear that no order can be made upon the city to pay these costs to the plaintiffs in these suits. She is not a party to the suits, and therefore is subject to none of a party's responsibilities. If she is liable to the railroad company upon a covenant to save it harmless, and if the payment of these costs is embraced by that covenant, the proper remedy of the company, after the payment, would be an action against the city on the covenant. That matter does not concern these plaintiffs.

As between the plaintiffs and the railroad company, the money was paid by the latter to and for the benefit of the former.

The city annexed to the covenant proposed by the railroad company certain provisos; these provisos were accepted by the railroad company; they make

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horse alleged to have been unlawfully detained by the appellees from the appellant.

The substance of the answer was, that Noland was treasurer and Shawhan deputy treasurer of Madison county; that Busby was a citizen and tax-payer of said county; that he was assessed with certain real and personal property; that the taxes levied upon said property for various purposes amounted to a certain sum; that the appellant failed to pay his taxes and was returned delinquent; that the auditor issued to the treasurer a precept for the collection of delinquent taxes; that Shawhan, as deputy treasurer, called upon the appellant for the payment of such taxes, which he refused to do; that thereupon he seized and levied upon the horse in controversy, to pay and discharge such delinquent taxes, with the interest and damages which had accrued thereon.

To this answer the appellant demurred. The court sustained the demurrer. The appellees appealed to this court,

reference to the resolutions of February 7th, 1870. The first of those resolutions contains an express statement, that the money is to be paid for the benefit of the plaintiffs, and that the plaintiffs shall execute releases to the company; and one of the provisos is, that if the releases shall not be executed, the money shall be returned by the city to the company. It is therefore not the case which it would be if there were an unqualified, unconditional covenant by the city to save the company harmless, on condition of a sum of money paid to the city.

It is substantially, as between plaintiffs and defendants, the case of money paid on a claim, by defendant to plaintiff, after suit brought. Such a payment may be pleaded in bar; when so pleaded, the costs, up to the time of the plea, are recovered by the plaintiff; the payment admits a cause of action for the amount paid. If, after such a payment, the parties go to trial on the general issue alone, the payment may be proved by plaintiff, as an admission; and then if plaintiff recovers judgment, he also recovers costs. But if the plaintiff, after taking the money, discontinues his suit, or, which is the same thing under our code of practice, dismisses his suit, then he is entitled to his costs to the time of paying the money. Such has been the invariable practice in this circuit. It is the same as where money is paid into court on a claim; there the plaintiff had always the right to take the money in satisfaction of his claim, discontinue his action, and have the costs, to the time of payment, taxed against the defendant. 1 T. R. 629; 4 T. R. 10; 8 T. R. 408, 486; 9 East, 325. If the plaintiff did not choose to discontinue his action, he might get his costs taxed, and if defendant refused to pay them, the plaintiff might proceed to trial and take a verdict for

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and assigned for error the sustaining of the demurrer to the answer. This court held the answer to be good, reversed the judgment, and remanded the cause, with instructions to the court below to overrule the demurrer to the answer, and for further proceedings. The case is reported in 28 Ind. 154, to which opinion we refer for a fuller statement of the case and the reasoning of the court.

When the cause was remanded, the court below overruled the demurrer to the answer and entered a rule against the appellant for a reply.

The appellant replied in five paragraphs. The appellees moved the court to strike out the second, third, fourth, and fifth paragraphs of the reply. The court sustained the motion as to the third and fourth paragraphs, and overruled it as to the second and fifth. The appellees then demurred to the second and fifth paragraphs. The court sustained it as

nominal damages and costs. 2 Strange, 1220; 1 Camp. 558, note. There is certainly no substantial difference between money paid into court and accepted in satisfaction, and money paid out of court and releases given in satisfaction.

I have thus far considered the question as it appears upon the papers; and I think it very clear that the plaintiffs, on dismissing their suit, will be entitled to recover costs up to the time of the payment, except such costs as have been heretofore adjudged in favor of defendants, if there are any such. It remains to consider whether the parol testimony heard on the motion to tax makes any difference. Mr. McKiernan testified that nothing was said by defendants' board of directors about costs; that they considered they were paying ten thousand dollars for a settlement, and had nothing to do with its distribution, and that the president told him the company would pay no costs; but this witness did not know that any notice to that effect had been given to any of the plaintiffs before the payment. It was also proved that the attorney of the city, after the payment of the money, had told Weinman that the company would pay no costs; and had said to Wagner, that if the plaintiffs would make no charge for their own fees as witnesses, the costs would not be much. It was also proved, that the attorney of the city and another attorney had told the plaintiffs that there was nothing in the instruments executed which made them liable for costs. There is nothing in this evidence which changes the legal effect of the transactions. I am, therefore, bound to decide, that the plaintiffs have a right to dismiss their suits, at the costs of the defendants up to the time of the payments; the defendants have a right to recover all costs heretofore adjudged in their favor, and all costs made since the payments.

(Signed)

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to the fifth, and overruled it as to the second, and the appellant excepted to the ruling of the court in sustaining it as to the fifth paragraph.

The cause was tried by a jury; there was a verdict for the defendants. The court overruled the plaintiff's motion for a new trial, and rendered judgment on the verdict.

The appellant has made twenty separate and distinct assignments of error. The first is based upon the action of the court in striking out the third and fourth paragraphs of the reply. This assignment of error presents no question for our decision, because the motion and the ruling of the court thereon are not made a part of the record by a bill of exceptions. When the court sustained the motion and struck out said paragraphs of the answer, they ceased to be a part of the record, and could only be made such by a bill of exceptions. This has been so often ruled by this court, that we would not feel justified in citing authorities. The second assignment of error presents for our decision the correctness of the ruling of the court in sustaining the demurrer to the fifth paragraph of the reply. The fifth assignment is based upon the refusal of the court to grant a new trial.

All the other assignments are the reproduction of the reasons for a new trial, and simply encumber the record, as the fifth assignment presents for review here all the reasons that were assigned for a new trial.

Did the court err in sustaining the demurrer to the fifth paragraph of the reply? It reads as follows: "And for further reply, the plaintiff says that since the commencement of this suit, to wit, on the 22d day of January, 1868, he paid off and fully satisfied the taxes, penalty, and interest on the duplicate mentioned in the defendants' answer; wherefore, he demands judgment for costs."

The matters set up in the above paragraph were pleaded in bar of the entire action. We do not think the payment of the taxes, after the commencement of the action, was a bar. The real and substantial question involved in the case

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was, whether the plaintiff was the owner of, and entitled to, the immediate possession of the horse in controversy, at the time when he commenced the action, and if he was not, he could not maintain his action. It was decided by this court, when this case was here before, that the matters set up in the answer were a complete defence to the action, and we think such ruling was correct. This court held, in *Carr v. Ellis*, 37 Ind. 465, that a plaintiff could not recover, in an action of replevin, upon a title which he had acquired subsequent to the commencement of the action. In the case under consideration, the plaintiff alleged in his complaint, which was verified by his affidavit, that he was the owner and entitled to the immediate possession of the horse in controversy. To entitle him to recover, he must have been entitled to the possession of the horse at the time when he commenced his action, and a subsequently-acquired title would not aid or help out a defective title. The right to maintain the action depends upon the question, whether the plaintiff is entitled to the immediate possession of the property claimed. If he is not, this action will not lie. 2 Wait Practice, 185. The court committed no error in sustaining the demurrer to the fifth paragraph of the reply.

The next assignment of error involves the correctness of the action of the court in overruling the motion for a new trial.

The appellant assigned, as reasons for a new trial, the exclusion of competent evidence, the giving of improper, and the refusal to give proper, instructions. All of these questions involve an inquiry into whether the taxes assessed and placed upon the tax duplicate were legal. The appellant, by paying his taxes since the commencement of this action, and without protest, has estopped himself from asserting that they were not legal. By paying the taxes under the circumstances which surrounded him, he admitted that they were legal, and we will not spend our time in determining whether he acted wisely or unwisely in paying all of the taxes charged against him upon the duplicate.

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It is next claimed that the verdict was not supported by the evidence. We think otherwise. When this case was here before, this court held, that "the duplicate is the treasurer's authority, as the writ is to the sheriff, and, if legal on its face, must be his justification, and is sufficient authority to enable him to hold property seized upon it in the collection of the taxes." We think the verdict was fully sustained by the evidence.

The appellant moved the court to tax against the appellees all the costs which had accrued subsequent to the time when the plaintiff paid the taxes. The court ordered that the costs which accrued subsequent to the payment of the taxes should be paid by the party which had created them. To this ruling the appellant excepted, and has assigned such ruling for error. We think the appellant should be very well satisfied with the ruling of the court below upon the question of costs; for the decision of the court was more favorable than he was entitled to; but there being no cross assignment of errors, we cannot disturb the finding below.

The appellees levied upon the horse of the plaintiff to satisfy certain delinquent taxes. Thereupon the plaintiff commenced this action and repossessed himself of his property. Subsequently he paid all the taxes charged against him, with the interest, costs, and damages thereon. This payment settled the legal status of the parties, and should have terminated the lawsuit. The plaintiff had paid all the demands against him; he had regained the possession of his horse, and his liability for the costs which had been created up to the time of payment was fixed and certain. There was nothing left to litigate about. The plaintiff should have dismissed his action; and having failed to do so, he should have paid all the costs that were created by the unnecessary continuance of the suit. The only judgment rendered on the verdict was for costs, which was subsequently modified.

The judgment is affirmed, with costs.

H. Craven, for appellant.

Stivers et al. v. McConnell.

STIVERS ET AL. v. McCONNELL.

PRACTICE.—*Bill of Exceptions.—Filing.*—A statement signed by the judge, in a bill of exceptions, for the filing of which seventy days had been given, that the same was “tendered, prepared, and signed by the court, within the term, and within the said seventy days given,” did not show that the bill of exceptions was filed within the time allowed.

SAME.—Where this court cannot tell from the bill of exceptions whether or not it contains all the evidence, the evidence will not be considered.

APPEAL from the Tipton Circuit Court.

DOWNEY, J.—The appellee sued the appellants and had judgment in his favor, after a trial by the court, and when a motion for a new trial had been made by the defendants and overruled by the court. The only error properly assigned is based on the refusal of the circuit court to grant a new trial.

It is impossible for us to tell whether the evidence is in the record or not, for the reason that we cannot ascertain where the bill of exceptions (if there is any in the record) commences; and after the conclusion of the record, and following the clerk's certificate, are sundry documents appended, which, so far as we can see, are no part of the record. And again, the clerk nowhere shows when the bill of exceptions (if one is in the record) was filed. Seventy days were given the defendants, in which to prepare and tender their bill of exceptions; and preceding the signature of the gentleman signing himself as judge *pro tem.*, it is stated that the bill of exceptions is “tendered, prepared, and signed by the court, within the term, and within the said seventy days given.” This does not show that the bill of exceptions was filed within the time allowed, or that it was ever filed. But if it did, as we have already said, we cannot tell what part of the record it embraces. We cannot, therefore, consider the question as to the sufficiency or insufficiency of the evidence, or whether the motion for a new trial was properly overruled or not.

The judgment is affirmed, with two per cent. damages and costs.

J. Green and D. Waugh, for appellants.

N. R. Overman, for appellee.

Hamrick v. Craven et al.

REYNOLDS ET AL. v. THE TOWN OF MONTICELLO.

APPEAL from the White Circuit Court.

DOWNNEY, J.—The appeal in this case is by only part of the defendants, and the cause is submitted without a compliance with sec. 551, 2 G. & H. 270. The appellee moves to dismiss the appeal for this reason. The motion must be sustained.

The appeal is dismissed, with costs.

J. E. McDonald and E. M. McDonald, for appellants.

R. C. Gregory and A. Reed, for appellee.

HAMRICK v. CRAVEN ET AL.

PLEADING.—*Exhibit.—Set-Off.—Promissory Note.*—An answer offering to set off a note must be accompanied by the note or a copy thereof, or must show a reason why this is not done.

EXECUTOR.—*Assignment of Note.*—An executor may transfer, by assignment, a note due his testator, so as to vest the title in the assignee.

APPEAL from the Hendricks Circuit Court.

PERRIT, J.—There are only two questions in this case.

First. Must an answer offering to set off a note be accompanied by the note or a copy of it, or show a reason why it is not done, such as a loss or destruction? We answer this question in the affirmative, and need only refer to 2 G. & H. 104, sec. 78, and the notes under it.

Second. Can an executor transfer, by assignment, a note due to his testator, so as to vest the title in the assignee? We also answer this question in the affirmative, and cite *Thomas v. Reister*, 3 Ind. 369, and authorities there cited.

Atkisson *v.* Martin *et al.*

The judgment is reversed, at the costs of the appellees, with instructions to the court below to sustain the demurrer to the answer.*

C. C. Nave and *C. A. Nave*, for appellant.

L. M. Campbell, for appellees.

*Petition for a rehearing overruled.

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134 683
136 19

ATKISSON *v.* MARTIN ET AL.

PRACTICE.—*Finding.*—Where the finding is not clearly wrong, upon the evidence, although it may not be clearly right, this court will not, upon the evidence, disturb the judgment.

SAME.—*Motion for New Trial.*—*Surprise.*—An affidavit pointing out the particulars in which the plaintiff was surprised by the evidence of the defendants, who were examined as witnesses on the trial, and naming witnesses by whom he could prove the opposite of what was testified to, it was held, was not ground for a new trial.

SAME.—*Cumulative Evidence.*—Where the plaintiff had already testified on the point, such evidence would be only cumulative, and therefore no ground for a new trial.

SAME.—*Exception to Judgment.*—Conceding that the noting of an exception to a judgment, in the record, by the clerk, sufficiently saves the exception, without a bill of exceptions, still there must be some pointing out of the objection to the judgment as rendered.

APPEAL from the Vanderburg Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellees, to recover a balance claimed to be due from the defendants to the plaintiff on partnership accounts.

The defendants, in their pleading, claimed a balance in their favor, and prayed judgment accordingly.

The cause was tried by the court. Finding and judgment for the defendants against the plaintiff for the sum of one thousand three hundred dollars.

The case comes before us on the evidence, and it is in-

Atkisson *v.* Martin *et al.*

sisted by the appellant that the finding is against the evidence, and that the damages assessed against him are excessive. We have examined the evidence with some care; and, while we might not have found exactly as the court did below, had we been trying the cause, yet we cannot, under the well established practice, disturb the judgment on the finding. The finding may not be clearly right; but it is not, as we think, clearly wrong. The evidence as to the main point in the case was quite conflicting; and the amount of damages assessed is not unsupported by the evidence. We omit a general statement of the facts involved, as it would serve no useful purpose as a precedent, and would swell this opinion to an unnecessary length.

A new trial was asked also on the ground that the plaintiff was surprised by the evidence of the defendants, who were examined as witnesses on the trial. An affidavit was filed by the plaintiff pointing out the particulars in which he was taken by surprise, and naming witnesses by whom he could prove the opposite of what was thus testified to. This would not seem to be ground for a new trial. *Cummins v. Walden*, 4 Blackf. 307; *Graeter v. Fowler*, 7 Blackf. 554; *Travis v. Barkhurst*, 4 Ind. 171; *Larrimore v. Williams*, 30 Ind. 18.

Besides this, the evidence of the witnesses named would have been cumulative, as the plaintiff himself testified on the point. See case last cited; also *Jennings v. Loring*, 5 Ind. 250; *Cox v. Hutchings*, 21 Ind. 219.

The record as made up by the clerk shows that the plaintiff excepted to the judgment as rendered, but the exception is not shown by any bill of exceptions. It is claimed that the judgment is erroneous, because it does not direct two promissory notes executed by the plaintiff, one to each of the defendants, to be delivered up and cancelled. We are inclined to the opinion that, under the pleadings in the cause, the effect of the finding and judgment was to cancel the notes in question. But however this may be, we think there is no available error in the record. Conceding that the ex-

Spellman v. The First National Bank of Shelbyville.

ception to the judgment might well be taken without a bill of exceptions, still there must have been some pointing out of the objection to the judgment as rendered. This was not done; nor did the plaintiff ask to have such judgment rendered as he claims should have been.

The judgment below is affirmed, with costs.

C. Denby and D. B. Kumler, for appellant.

A. Dyer, for appellees.

SPELLMAN *v.* THE FIRST NATIONAL BANK OF SHELBYVILLE.

SUPREME COURT.—*Notice of Appeal.*—Where, upon an appeal to the Supreme Court from a joint judgment, any of the judgment defendants do not join in the appeal, and notice of the appeal is not given them, as required by section 551, 2 G. & H. 270, the appeal will be dismissed.

APPEAL from the Shelby Circuit Court.

PETTIT, J.—Appellee brought suit on a note payable in bank against Hinkle, Wright, and Spellman, the appellant. Hinkle was not served with process, nor did he appear. Issues were formed as to Wright and Spellman, trial by the court, and judgment rendered against them jointly. Spellman only appealed, and has assigned errors, but has not given notice to his co-party, as required by sec. 551, 2 G. & H. 270. Following numerous rulings of the court, both formerly and latterly, the appeal must be dismissed, which is done at appellant's costs.

M. M. Ray, and O. F. Glessner, for appellant.

E. H. Davis and C. Wright, for appellee.

Jewett et al. v. The Honey Creek Draining Company.

JEWETT ET AL. v. THE HONEY CREEK DRAINING COMPANY.

39	245
132	389
39	245
136	560

PRACTICE.—*Demurrer.*—A demurrer assigning no cause of demurrer should be overruled.

SAME.—*Joint Demurrer.*—A demurrer to several paragraphs jointly, one of which is good, should be overruled.

APPEAL from the White Common Pleas.

DOWNEY, J.—This was an action brought by the appellee against Jewett and the other appellants, as his securities, on his bond as treasurer of the said draining company. The breaches charge that he failed to render accounts of the money which came to his hands, or to pay the same over to the company or to his successor in office, on demand, and has converted and applied the same to his own use. There was an answer of several paragraphs filed, some of the paragraphs by all the defendants, and some by the sureties alone. A demurrer was sustained to the fourth and sixth paragraphs; and there was a reply, by denial, to the second, third, and fifth. A trial by jury was had, and there was a verdict and judgment for the plaintiff. The errors assigned are, the sustaining of the demurrer to the fourth and sixth paragraphs of the answer.

The record is in a confused condition. But there is one point, arising under the assignments of error, which is presented by counsel for the appellants, and which we think is well taken. The demurrer to the fifth, sixth, and amended second paragraph of the answer, was as follows:

“The plaintiff demurs to the fifth and sixth paragraphs of defendants' answer, and to the second amended paragraph of answer. GRIDLEY & GREGORY, Att'y's.”

The fifth paragraph of the answer is the general denial, and there is no objection to it. But the court sustained the demurrer to the sixth paragraph of the answer. Now, it is a rule of pleading, that where the demurrer is to several paragraphs of a pleading jointly, and any one of such paragraphs is good, the demurrer must be overruled as to all. *Urton v. Luckey*, 17 Ind. 213.

Woodruff *v.* Garner.

But this demurrer assigned no cause whatever, and for this reason should have been overruled as to all the paragraphs to which it was filed. 2 G. & H. 77, sec. 50, clause 6.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer.

C. H. Test, Matlock & Davis, S. A. Huff, B. W. Langdon,
and F. S. Pettit, for appellants.

HIATT *v.* PETTIJOHN.

APPEAL from the Hamilton Circuit Court.

DOWNEY, J.—The transcript in this case is not authenticated by the seal of the circuit court. 2 G. & H. 273, sec. 558; *Hinton v. Brown*, 1 Blackf. 429.

The appeal is dismissed, with costs.

F. W. Evans, for appellant.

G. H. Voss and T. F. Kane, for appellee.

WOODRUFF *v.* GARNER.

DEPOSITION.—*Retaking.*—*Taking by Other Party.*—*Evidence.*—Although a party may not be at liberty to retake the deposition of a witness, except by leave of court, yet the taking of the deposition of a witness by one party to a suit does not prevent the other party from taking his deposition also; and one party may introduce both depositions in evidence.

EVIDENCE.—*Fraud.*—*Rescission.*—*Waiver.*—Where a person is seeking the rescission of a contract, on the ground of fraud, evidence is competent which has a tendency to show that the conduct of said person has been such as to repel any inference that a fraud has been practised upon him, or to show that he adhered to the contract after having discovered the fraud.

APPEAL from the Rush Circuit Court.

WORDEN, J.—The appellant, Woodruff, sued the appellee,

Woodruff *v.* Garner.

Garner, to obtain the rescission of a contract entered into by the parties for the exchange of lands, and of a conveyance made by the plaintiff to the defendant, in pursuance of the contract, upon the ground that the contract and conveyance were induced by the false and fraudulent representations of the defendant. Issues were formed, and the cause was tried by a jury, resulting in a verdict and judgment for the defendant.

The plaintiff below appeals, and has assigned several errors, but they are all covered by the assignment upon the overruling of his motion for a new trial. The reasons for which a new trial was asked were sufficient to cover all the points made for a reversal, in the brief of counsel for the appellant.

On the trial, the defendant offered to read in evidence the deposition of Julius Sharpe, as taken by the defendant, but the plaintiff objected, on the ground that before that time the defendant had read to the jury the deposition of the same witness, as taken by the plaintiff; but the objection was overruled, the deposition read, and the plaintiff excepted.

This, it is claimed, was error. We are not of that opinion. No authority is cited in support of the position assumed, and we know of none. A party may not be entitled to re-take the deposition of a witness without leave of the court, but the fact that one party has taken the deposition of a witness does not prevent the other party from taking it. The deposition last taken by one party may not embrace the subject-matter of that first taken by the other party. When the deposition of a witness is thus taken by both parties, each deposition may contain evidence favorable to each party, and where one party has introduced the deposition taken by the opposite party, we see no good reason why that fact should preclude him from introducing the deposition taken by himself.

In the absence of any authority, or apparent reason to the contrary, we hold that no error was committed in this ruling of the court.

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On the trial, the plaintiff was examined as a witness on his own behalf; and on his cross examination, the following questions were put to him by the defendant's counsel, and answers elicited:

Question. "Did you not say to James Cottrell, on the 2d day of August, 1860, after you had been up to see the farm in Shelby county" (the land in Shelby county, Ohio, for which the plaintiff had traded), "and as you and Cottrell were coming home, south from Mrs. Misners, Franklin county, that you were going to send your son and son-in-law up to your place in Ohio and set them to work, and you and your son-in-law Hoffman were going to rent a good place in Franklin county, and were going to work all you could and throw it all together and pay off the mortgage?"

Ans. "I told him something like that; if Garner did as he agreed to, we were going to fix it up; am not certain whether the conversation was before I went up to Ohio, or after I came back."

Ques. "Did you, at that time, say one word about Garner, or make any objection to the trade, or say that he was to do anything about the trade?"

Ans. "I can't tell whether I did or not."

Ques. "Did you not go over to Garner's some time in August, 1860, and propose a trade of the same lands with him? and did you, at that time, make one word of complaint about the misrepresentation of Garner in your former trade of these lands?"

Ans. "Sometime about the time possession was to be given, I went to Garner and offered to trade him forty acres of the Franklin county land, if he would pay off the five hundred-dollar mortgage, and he pay me the difference, and I would give him time on the difference."

To these questions, severally, the counsel for the plaintiff objected, on the ground that the same were illegal, incompetent, and irrelevant; but the objection was overruled, and exception taken.

Tippecanoe Township, Carroll County, *v.* Manlove, Receiver.

' It will be observed that it was not objected that the questions were not germane to the examination in chief.

It seems to us that the questions were proper. Evidence is competent, which has a tendency to show that the conduct of a party is such as to repel any inference that a fraud has been practised upon him, or, where he is seeking a rescission on the ground of fraud, that he adheres to the contract after having discovered the fraud.

There is no other question made in the brief of the counsel for the appellant, except the question whether the verdict is sustained by the evidence.

The case is not one in which we feel authorized, under the well established practice, to disturb the verdict.

The judgment below is affirmed, with costs.

H. C. Hanna, for appellant.

W. Morrow and N. Trusler, for appellee.

TIPPECANOE TOWNSHIP, CARROLL COUNTY, *v.* MANLOVE, RECEIVER.

MUTUAL INSURANCE COMPANY.—*Receiver.*—Assessment.—*Embree v. Shideler*, 36 Ind. 423, adhered to.

APPEAL from the Carroll Common Pleas.

PETTIT, J.—The appellant sued the appellee, to collect an assessment on a premium note given for three policies issued by the Farmers and Merchants' Insurance Company. A demurrer, for want of sufficient facts, was overruled to the complaint.

This case presents the same questions as *Embree v. Shideler*, 36 Ind. 423, and a number of similar cases decided since, but which are not reported; and a majority of the court hold that this must meet the same fate.

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The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer to the complaint.

C. R. Pollard, B. B. Daily, and D. B. Graham, for appellant.

F. R. Troxell and W. R. Manlove, for appellee.

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125 484

WISEMAN ET AL. *v.* LYNN.

REPLEVIN.—*Dismissal.*—*Judgment for Return of Property.*—There can be no judgment for the return of the property, where the plaintiff in an action of replevin dismisses his action before a finding is announced by the court or a verdict is returned by the jury. (DOWNEY, J., dissented.)

SAME.—*Failure to Prosecute.*—*Liability of Sureties.*—Such dismissal of the action will render the sureties on the replevin bond liable for a failure of their principal to prosecute the action with effect.

SAME.—*Pleading.*—*Answer of Property in Plaintiff.*—An answer to an action on the bond, of property in the plaintiff in the action of replevin, constitutes no defence to the action, but the fact goes in mitigation of damages.

STATUTE.—*Certificate of Clerk to Record.*—Section 283 of the code is to be construed in connection with section 4 of the act providing for the election of clerks and prescribing some of their duties, in determining the sufficiency of the certificate of a clerk to a record. Accordingly, a certificate enumerating certain papers is not sufficient, if it does not show that the papers named are “complete copies of all the papers;” nor does a certificate that “the record entries of same in the above entitled cause, now on file and of record in said office,” cover and embrace “all the entries of such cause.”

REPLEVIN BOND.—*Recital of Value.*—The recital, in a replevin bond, of the value of the property is sufficient evidence of the value, in an action on the bond, and estops the plaintiff and his sureties from denying the same.

APPEAL from the Fayette Common Pleas.

BUSKIRK, C. J.—This was an action on a replevin bond by the appellee against the appellants. The action was commenced in the Franklin Common Pleas, and upon the application of the appellants, the venue was changed to Fayette county.

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The substantial averments of the complaint were these: That John Church, Jr., on the 23d of March, 1869, filed his complaint and affidavit in replevin against the appellee, in the Franklin Circuit Court, to recover the possession of a certain Emerson piano, numbered 5795, which it was alleged was unlawfully detained by the defendant in that action; that upon the filing of such complaint and affidavit, a writ of replevin was issued by the clerk of said court and delivered to the sheriff of said county, who, by virtue thereof, took from the possession of the said appellee the piano named in the verified complaint; that on the 8th day of April, 1869, the said Wiseman and Frank executed to the sheriff of said county an undertaking and bond, in said action, conditioned that said Church should prosecute said action to effect and without delay, and return said piano to the said Lynn, if return be adjudged by the court, and to pay all sums of money that might be recovered against said Church in said action, for any cause whatever; that upon the execution of the said bond, the said sheriff delivered the said piano to the said Church, who has ever since retained the possession thereof; that subsequent to the delivery of the said piano, the said Lynn had recovered, in the said court, a judgment for the return of said piano and all proper costs; that the said Church, Wiseman, and Frank wholly failed, refused, and neglected to comply with the conditions of the said bond, in this, that said Church failed to prosecute said suit to effect and without delay; that said Church and the said defendants have failed, refused, and neglected, and still refuse and neglect, to return said property to the plaintiff, or to pay the costs adjudged against the said Church; and that the said piano was of the value of four hundred dollars, for which sum judgment was demanded.

To which complaint a demurrer was filed and overruled, but no exception was taken.

The defendants answered in four paragraphs. A demurrer was sustained to the second, third, and fourth paragraphs of the answer; to which ruling the appellants excepted.

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The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the plaintiff, in the sum of four hundred dollars. The court overruled a motion for a new trial, and rendered judgment on the finding.

The appellants have assigned for error the sustaining of the demurrer to the second, third, and fourth paragraphs of the answer, and the overruling of the motion for a new trial.

Did the court err in sustaining the demurrer to the answer?

The fourth paragraph of the answer contains all that is in the second and third, and, in addition, some allegations that are not in either of the preceding paragraphs. We will, therefore, omit the second and third paragraphs, and set out the fourth, which reads as follows:

"For fourth answer, the defendants say that on the 14th of October, 1867, John Church, Jr., and Oliver Ditsen were partners in trade, under the name and style of John Church, Jr., and, as such, were the legal owners of and in possession of the piano mentioned in said complaint; that on said 14th of October, 1867, by written agreement, they, in their firm name, rented said piano to Ulysses V. Kyger, who, by the name and description of U. V. Kyger, executed said agreement, a copy of which is filed herewith and made a part hereof, and reads as follows:

"CINCINNATI, OHIO, Oct. 14th, 1867.

"J. Church, Jr., has this day rented to Mr. U. V. Kyger, residing in Brookville, Indiana, one Emerson piano, No. 5795, valued at four hundred dollars, to be used only by the said Kyger and friends, in his said residence, and not to be removed therefrom without the written consent of said J. Church, Jr., indorsed hereon; the rent is to be twenty-five dollars per month, payable monthly in advance, on the 14th of each month, at the store of the said J. Church, Jr., Cincinnati, without any demand whatsoever to be made therefor. Said renting may be terminated at any time by the said J. Church, Jr., at his option, by the failure of the said U. V.

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Kyger to pay said monthly rent when the same shall become due, or by the use of said instrument in any manner than that provided for above, or by the removal of the said instrument from the place above described, or by the abuse of the same, or by any other circumstances that may give said J. Church, Jr., reason to fear for the proper treatment of his said property. The said U. V. Kyger is to take good care of the said instrument, keep the same in good order, and so return the same to the said J. Church, Jr., whenever the said renting may be terminated, whether at the expiration of fifteen months, or by failure to comply with the terms above named. If the said U. V. Kyger desires to purchase said instrument, he may do so at any time during the continuance of said renting, by the payment to the said J. Church, Jr., of the sum of four hundred dollars, in which case all sums paid for rent within sixteen months, should said renting so long continue, will be deducted from said sum; but the privilege to purchase said instrument shall in no way interfere with the right of the said J. Church, Jr., to control said instrument (all property remaining in him) until said purchase-money is paid. U. V. KYGER.'

"That afterward, to wit, on the first day of July, 1868, said Kyger, without right and without authority from said firm of John Church, Jr., and in express violation of said written agreement, delivered the said piano to one Elizabeth Willis, who, without any legal right, and in violation of said agreement, took the possession thereof, and so unlawfully held the same for a great length of time, to wit, to the 1st of October, 1868, at which time, without any authority from the said firm of John Church, Jr., and without any right whatever, delivered the same to the said plaintiff, Jackson Lynn, who, without any right or authority whatever from the said firm of John Church, Jr., and in express violation of the terms of the said agreement, took possession of the said piano, and, although often requested so to do, wholly failed and refused to return the said piano to the said firm of John Church, Jr.; and thereupon the said suit was insti-

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tuted by said John Church, Jr., who, by accident, inadvertence, and mistake, brought said suit in his own name, and did not join with him as plaintiff said Oliver Ditsen, his partner; that on the trial of said cause, and before the same had been fully determined, said John Church, Jr., was compelled to, and did, dismiss his said suit, and the defendants say that the said plaintiff having no title or claim to the said piano, and the same being the property of the said firm of John Church, Jr., said plaintiff has sustained no damages herein, and is not entitled to the possession of the said piano."

The sufficiency of the answer greatly depends upon the assignment of the breach of the conditions of the bond. The substantial assignment is, that John Church, Jr., failed to prosecute his action of replevin with effect. It is also assigned as a breach of the condition of the bond, that there was a judgment for the return of the property, and that the appellants had failed and neglected to make such return, but retained the possession of the property. It is maintained by the appellants, that there could be no judgment for the return of the property, where the plaintiff in the action of replevin dismissed his action before a finding was announced by the court, or a verdict was returned by the jury. By section 363 of the code, 2 G. & H. 216, a plaintiff may dismiss his action before the jury retire, or, when the case is tried by the court, before the finding of the court is announced. When a cause has been dismissed with the permission of the court, it is no longer pending, and, consequently, no judgment can be rendered, other than a judgment for costs. *Breese v. Allen*, 12 Ind. 426. Section 364 of the code, 2 G. & H. 217. This rule does not apply where there is a set-off or counter claim pleaded. Section 365, 2 G. & H. 217. A judgment may be rendered by confession or default without a trial, but in all other cases a judgment must be based upon the verdict of a jury, or a finding by the court. Sections 370 and 371 of the code, 2 G. & H. 218. We are of the opinion that the court possessed no power to

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render a judgment for a return of the property in the replevin suit. The conclusion to which we have come is not in conflict with the ruling in the case of *Mikesill v. Chaney*, 6 Ind. 52; for that decision was placed upon a section of the statute of 1843, which expressly authorized the court to order a return of the property after nonsuit. But we have no such statute now.

It remains to inquire, whether the obligors in a replevin bond are liable for the value of the property, where the plaintiff dismisses his action before the jury retire. One of the conditions of the bond was, that the plaintiff would prosecute his action of replevin with effect, and without delay. It was held by this court, in the case of *Brown v. Parker*, 5 Blackf. 291, that a failure to prosecute a suit with success is a failure of prosecuting it with effect; that the action of replevin must be prosecuted to a successful decision, otherwise it is no compliance with the condition of the replevin bond.

The ruling in the above case was based upon the cases of *Morgan v. Griffith*, 7 Mod. 380, and *Dias v. Freeman*, 5 T. R. 195, and has been followed by this court in the cases of *Robertson v. Caldwell*, 9 Ind. 514; *Tardy v. Howard*, 12 Ind. 404; *Wheat v. Catterlin*, 23 Ind. 85, and may now be regarded as the settled law in this State. But it is maintained by the appellants, that the allegation in the answer, that the property belonged to the firm of John Church, Jr., and not to the plaintiff in this action, constituted a defence to the action, and that consequently the court erred in sustaining the demurrer. We think otherwise. It was said by this court, in *Sherry v. Foresman*, 6 Blackf. 56, that "the fact, that the property replevied belonged to Foresman and Earl cannot be a bar to the breach assigned, viz., their failure in the suit which they had brought for the unlawful taking of the property."

To the same effect are the cases of *Davis v. Crow*, 7 Blackf. 129; *Wallace v. Clark*, 7 Blackf. 298.

The fact that the property replevied belonged to the plain-

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tiff in that action does not constitute a bar to the action, but only goes in mitigation of damages. See the authorities above cited from Blackford, and *Sammons v. Newman*, 27 Ind. 508.

Matters in mitigation only, except in actions for libel and slander, cannot be specially pleaded or set up by way of answer, but may be given in evidence under the general denial. *Smith v. Lisher*, 23 Ind. 500; *Sammons v. Newman*, 27 Ind. 508; *Story v. O'Dea*, 23 Ind. 326; *Whitney v. Lehmer*, 26 Ind. 503. The error, if one had been committed in sustaining the demurrer to the answer, was a harmless one, because the fact might have been proved under the general denial, which was pleaded. The court committed no error in sustaining the demurrer to the answer.

The next error assigned is based upon the action of the court in overruling the motion for a new trial. In support of this assignment, three reasons are urged. The first is, that the court erred in admitting in evidence the transcript of the action in replevin. The only objection urged to the transcript is that the certificate is defective. The certificate is as follows:

“State of Indiana, Franklin county. I, Samuel S. Harrell, clerk of the circuit court within and for the county and State of Indiana aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the complaint, affidavit, undertaking for costs, writ, bond, and return of sheriff on writs, summons, and return of sheriff thereon, answer of defendant, demurrer to answer, reply of plaintiff, and motion to strike out reply, and the record entries of same in the above entitled cause, now on file and of record in said office, and amount of fees taxed at twenty-seven dollars and thirty-five cents.

“In witness whereof, I have hereunto set my hand and affixed the official seal of said court, at Brookville, Indiana, this 26th of July, 1870.

[SEAL.]

“SAMUEL S. HARRELL,
“Clerk Franklin Circuit Court.”

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The statute providing for the admission of copies of records as evidence is found in 2 G. & H. 183, sec. 283, and provides that they shall be "proved or admitted as legal evidence in any court or office in this State, by the attestation of the keeper of said records," etc., * * "that the same are true and complete copies of the records," etc.

The counsel for appellants have referred us to the above section of the code and the cases of *Tull v. David*, 27 Ind. 377, and *Fry v. The State, ex rel. Ristine*, 27 Ind. 348, in support of their objection to the certificate.

In the case of *Tull v. David, supra*, the certificate was not either a strict or substantial compliance with the statute, and was, consequently, clearly bad. This court decided that the words, "a true transcript of the proceedings had in said cause, as appears by the record books of my office," did "not mean a full, true and complete transcript of the record." The certificate in the above case did not show that the transcript contained a full, true, and complete copy of the papers and proceedings had, but only what appears in the record books.

The case of *Fry v. The State, ex rel. Ristine, supra*, is not in point, as that was a special proceeding, where the statute prescribed the form of the certificate. This court held, that the certificate did not comply with the requirements of the statute, because it did not show that "it was a copy of an account made out by the auditor, or an account made out in a settlement with the auditor." See secs. 6-8, 1 G. & H. 120.

This court, in *Weston v. Lumley*, 33 Ind. 486, held that a certificate, "that the foregoing is truly copied from the records of the board of commissioners of said county, at their September session, A. D. 1867, to wit, September 2d, A. D. 1867," was not a compliance with the statute. The court say: "The certificate of the auditor was defective. It was not sufficient for him to certify that it was truly copied from the records. He should have certified that it was a 'full, true, and complete transcript of the record.' *Smith v.*

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Jeffries, 25 Ind. 376; *Tull v. David*, 27 Ind. 377. The ruling of the court below on this point was correct."

Section 283 of the code is to be construed in connection with section 4 of the act providing for the election of clerks and prescribing some of their duties, which reads as follows: "In all cases where a complete record is dispensed with, the production of the papers and entries relating thereto, and all transcripts thereof, certified and attested with the seal of such court, as complete copies of all the papers and entries of such cause, shall have the same force in evidence as a transcript of a complete record thereof." 2 G. & H. 13.

The certificate in the case under consideration does not comply with either section 283 of the code or section 4 of the act prescribing the duties of clerks. To make the certificate good under section 283, the clerk must certify "that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody." The clerk is required by section 4, *supra*, in certifying to transcripts, to certify to them "as complete copies of all the papers and entries of such cause."

Where the legislature has prescribed the forms to be used by a ministerial officer, there must be a substantial compliance. Sec. 800 of the code, 2 G. & H. 336; *Spencer v. The State*, 5 Ind. 41; *Spaulding v. Harvey*, 7 Ind. 429.

The certificate in question is specific in its character, while the statute requires that it should certify that it contained "all the papers and entries in such cause." How are we to know that the papers specifically named were all the papers in the cause? or how are we to know that the words, "the record entries of same in the above entitled cause, now on file and of record in said office," covered and embraced "all the entries in such cause?" The certificate does not say that it contains all of the entries, but only the record entries that are on file and of record in his office.

We are of the opinion that the certificate was defective, and that the court erred in admitting in evidence the transcript of the replevin suit.

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It is next maintained by the appellants that there was no evidence as to the ownership of the piano. We think otherwise. Mrs. Willis testified that she purchased the piano of Kyger, who was in possession of it at the time of the sale.

The evidence of the appellee was as follows: "I am the plaintiff in this suit; in November, 1868, I got the piano of Mrs. Willis; she had it still, and came and sold it to me; it was in her possession at the time."

There was no evidence contradicting the above evidence. The presumption of the law is, that the party in possession of personal property is the owner of the same; and so, also, as men usually own the personal property they possess, proof of possession is presumptive proof of ownership. *1 Greenl. Ev., sec. 34.*

But in this, the evidence established not only possession of the piano, but that it had been purchased of persons who were in possession at the times of its sale, claiming the same as their own. We think that the evidence was sufficient, in the absence of other evidence, to establish ownership.

It is next urged that the court below erred in overruling the motion for a new trial, for the reason that there was no evidence as to the value of the piano, and that, consequently, the court erred in rendering judgment for the sum of four hundred dollars.

We are of a different opinion. The action was based solely upon the replevin bond, executed by the appellants. It was admitted in the body of the bond that the piano was of the value of four hundred dollars. The plaintiff in the replevin suit, in his affidavit, swore that the piano was of the value of four hundred dollars. The bond was read in evidence, and, in our opinion, sufficiently established the value of the piano. The recital in the bond, that the piano was of the value of four hundred dollars, was a solemn admission of the appellants, and which, in an action upon the bond, would estop them from denying the truth of the admission. *Trimble v. The State, 4 Blackf. 435; May v. Johnson, 3 Ind. 449; Guard v. Bradley, 7 Ind. 600; Sammons v.*

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Newman, 27 Ind. 508; *The German Mutual Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249; 1 Greenl. Ev., sec. 22.

For the error of the court in admitting in evidence the transcript of the replevin suit, the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

DOWNEY, J.—From so much of the foregoing opinion as holds that there can be no judgment for a return of the property to the defendant, in case the plaintiff dismisses his action or suffers a nonsuit, I am compelled to dissent.

C. C. Binkley and F. C. McIntosh, for appellants.

T. B. Adams and F. Berry, for appellee.

39	260
196	444
30	260
157	276
157	279
39	260
166	132
166	133

THE WESTERN GRAVEL ROAD COMPANY *v.* COX ET AL.

CONTRACT.—*Speculative Damages.—Profits.*—Suit for work and labor in the construction of a gravel road. A counter claim was filed, claiming damages for the failure to complete the road at the date contracted, and an item specified was "the loss of tolls she might have received." This item was struck out on motion.

Held, that the ruling was correct, as the damages were too vague and uncertain to be ascertained.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—William H. Cox sued the Western Gravel Road Company for work and labor done by him for the defendant, under a written contract, in the construction of a portion of her road.

The defendant pleaded a counter claim, alleging that by the contract between the parties, the work was to have been completed within a specified time, and that the plaintiff failed

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to complete the same within the time specified. The counter claim demanded damages for the failure, and specified as an item thereof "the loss of tolls she might have received," had the road been completed in accordance with the contract. This item of damages was stricken out on motion of the plaintiff, and the defendant excepted. There was a trial of the cause by the court, resulting in a finding and judgment for the plaintiff.

The defendant appeals and presents the sole question, whether the ruling was correct in striking out the item of damages above specified. The counsel for the appellant claim that the item of damages thus stricken out was legitimate and proper, and, therefore, should not have been stricken out; but they have cited no authorities upon the point.

The counsel for the appellee insist that the tolls which the road might have earned, had it been completed at the time mentioned, are too uncertain, contingent, and speculative to form the basis of damages, and, therefore, that the item was correctly stricken out; and they cite the following authorities: *Freeman v. Clute*, 3 Barb. 424; *Giles v. O'Toole*, 4 Barb. 261; *Blanchard v. Ely*, 21 Wend. 342; *Griffin v. Colver*, 16 N. Y. 489. These cases seem to us to be in point. In the case of *Giles v. O'Toole*, an action was brought by a lessee against the lessor for refusing to give possession of the demised premises. The plaintiff was a milliner, and had rented the premises for a shop. It was held incompetent to prove, for the purpose of showing her damages, the profits she might have made by the use of the building in carrying on her business. The case in 3 Barb. and the one in 21 Wend. are commented upon in the case in 16 N. Y., and need not be further noticed here. The case of *Griffin v. Colver, supra*, is said by Mr. Sedgwick to be the leading American case on this subject. Sedgw. Dam. (5th ed.) 79, note. In that case, the plaintiff had agreed to build a steam engine, with boilers, etc., for the defendants, and to deliver it to them on a certain day. He failed to do so, and

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a delay of one week occurred, during which time the defendants lost the use of certain machinery for the sawing and planing of lumber, which the steam engine was intended to drive. The plaintiff having brought his action for the price of the engine, the defendants recouped their damages from the failure to deliver it at the time fixed by the contract. They gave evidence that the net average value of the use of the engine, at the place where it was located, for the purpose for which it was intended, and in connection with the defendants' machinery, was fifty dollars per day above the wear and tear and the expense of running it. The estimate was arrived at by a calculation from the quantity of lumber the machines driven by the engine would cut and plane in a day, the prices received by the defendant for planing, and the expenses of running, and the wear and tear. The referee held that this did not present the proper measure of damages, but he allowed the defendants fifty dollars, "as a proper compensation upon their investment or the value of the property which was partially unoccupied by reason of the plaintiff's default." The Court of Appeals held unanimously, in a well considered opinion, that the action of the referee was correct. The following passages from the opinion of the court, as pronounced by SELDEN, J., will sufficiently indicate the ground upon which it was decided: "The only point made by the appellants is, that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

"To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon

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which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price, at the place and on the day when and where they should have been delivered.

"On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

"There is also an additional reason, viz., the difficulty of

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obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story, in the case of *The Schooner Lively*, 1 Gallis. 315, which was a case of illegal capture. He says: 'Independent however of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets, to an exactness in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage, and the season of arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjecture, and not upon facts.'

"Similar language is used in the cases of *The Amiable Nancy*, 3 Wheat. 546, and *LaAmistad de Rues*, 5 Wheat. 385. Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business, to constitute a safe criterion for an estimate of damages." The opinion, after citing and commenting upon further authorities, proceeds as follows:

"From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits." The opinion concludes as follows:

"The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been the fair price to pay for the use of the engine and ma-

The Western Gravel Road Company *v.* Cox *et al.*

chinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. There is no error in the other allowances made by the referee. The judgment should therefore be affirmed."

In addition to the above authorities cited by counsel for the appellee from the State of New York, we note the following from other states. In the case of *Waite v. Gilbert*, 10 Cush. 177, it was held that a common carrier who at first wrongfully refuses, but afterward delivers goods consigned to a manufacturer, is not liable for loss of profits arising from his delay.

In the case of *Rhodes v. Baird*, 16 Ohio St. 573, an action was brought on a contract by which the defendant agreed to make a lease for the term of ten years to the plaintiff, of certain lands on which to plant and cultivate a peach orchard. The breach consisted in the failure of the defendant to make the lease, and in his causing the plaintiff, within two years from his taking possession, to be evicted from the premises, but after the peach trees were planted. On the trial the plaintiff was permitted to give evidence of the probable profits that might in future be realized from the orchard, judging by the number of crops and the prices of peaches in the county for the last ten or fifteen years. Held, that the evidence as to the probable future profits was incompetent to be given in chief by the plaintiff, as furnishing a basis for the assessment of damages by the jury, such evidence being uncertain and speculative in its nature, and in a great degree conjectural.

In the case of *Davis v. Cincinnati, etc., Railroad Company*, 1 Disney, 23, it was held that where the defendant failed to deliver, in a reasonable time, a boiler constructed for a saw-mill, the profits that might have been realized, had the boiler reached its destination at the proper time, could not be recovered as damages. The court say: "The profits which might have been made, if the mill had been completed at the time it would have been had the boiler been received,

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are of a character too contingent to authorize a recovery for damages."

In the case of *Cooper v. Young*, 22 Ga. 269, it was held, that evidence of the loss of profits by the necessary suspension of iron works, in consequence of the failure of a common carrier to deliver coal according to contract, was inadmissible in an action against the carrier for the failure to deliver in accordance with his contract.

In the case of *Taylor v. Maguire*, 12 Mo. 313, a party had contracted to build a boat hull, and deliver it on a stated day. He failed to deliver it until two months after the time specified. Held, that he was not liable in damages for the profits that might have been realized by the use of the boat during the two months. To the same effect is the decision in a case between the same parties reported in 13 Mo. 517. See, also, *Singer v. Farnsworth*, 2 Ind. 597.

In view of these authorities, we are of opinion that the loss of tolls was not a proper basis for estimating damages, and, consequently, that no error was committed in striking out the claim therefor.

The amount of tolls that would have been received could not have been ascertained with any degree of certainty, but must have been left to the merest conjecture. The amount would have depended upon the number of persons who might have travelled over it, the distance travelled by each, and the character of the vehicles and number of horses used, etc. All this is too vague and conjectural to form a proper basis for damages.

We need not indicate what would have been the proper measure of damages in such case, as the question is not before us. We are not advised what rule was adopted by the court as the proper measure, and must presume that the correct rule was adopted.

The judgment below is affirmed, with costs.

G. O. Behm, A. O. Behm, and J. A. Stein, for appellant.

S. A. Huff, B. W. Langdon, J. S. Pettit, and W. C. Wilson,
for appellees.

Miller v. The State.

MILLER v. THE STATE.

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161 119

CRIMINAL LAW.—*Carrying off Products of Soil.—License.—Revocation.*—The defendant, in a prosecution for entering on land and carrying away products of soil, had sold hay to the prosecuting witness, on condition that he might enter, in the fall, into her corn-field, and gather and remove a sufficient amount of corn to pay for the hay. He entered to gather the corn, and she forbade him to gather. He proceeded to gather a quantity of a value less than that of the hay. The court, on the trial, instructed the jury, that a “license may be granted by parol; and as long as a party is acting under such license, he will not be a trespasser; but such license may be revoked at any time. If the defendant entered upon the lands of the prosecuting witness, under a parol license, and before he gathered any corn she forbade his gathering, and the defendant, after being forbidden, did gather and remove the said corn from the premises, without the consent of the prosecuting witness, the act was unlawful, and the defendant was liable.”

Held, that the charge was erroneous, as a license cannot be revoked, where it is coupled with an interest and supported by a valid consideration.

APPEAL from the Clinton Common Pleas.

BUSKIRK, C. J.—This prosecution was based upon section 76, as amended by the act of February 14th, 1865, which reads as follows:

“Sec. 76. Any person who shall unlawfully go upon the lands of another, and any person who shall unlawfully pull off, or pull off and carry away any corn growing on the stalk, or any fruit on the tree, bush, or plant, pumpkin or melon on the vine, or other annual product attached to the realty, or growing in the soil, of the value of ten cents, or upwards, the property of another, shall be fined in any sum not exceeding fifty dollars, to which may be added imprisonment in the county jail for any period not exceeding six months; and any person concerned in the commission of any such offence, may be compelled to testify against the others, but in such case shall be exempt from punishment himself for such offence.” 3 Ind. Stat. 261.

The information charged that the appellant unlawfully went upon the lands of Amos Bruner, and then and there unlawfully pulled off fifty bushels of corn growing on the stalks, and carried the same away; the said corn then and

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there being the property of Martha Lowry, and of the value of fifteen dollars.

There was a trial by a jury, resulting in a verdict against the defendant. The court overruled a motion for a new trial. The appellant has assigned for error the refusal of the court to grant him a new trial. Three reasons were assigned for a new trial; first, the insufficiency of the evidence to sustain the verdict; second, the giving of erroneous instructions; third, newly-discovered evidence.

The case, as made by the evidence, was this:

The appellant owned and cultivated a farm. The prosecuting witness, Mrs. Lowry, occupied an adjoining farm as the tenant of Amos Bruner. During the hay harvest of 1871, the appellant sold to Mrs. Lowry two and one-half tons of hay, at eight dollars per ton, to be paid for in the fall, in corn, at the market price. Thus far there was no conflict in the testimony. Four witnesses testified, on behalf of the appellant, that it was expressly agreed between the appellant and Mrs. Lowry, that the appellant was to have the right and privilege to go into the corn-field of Mrs. Lowry, and gather and carry away enough corn to pay for the hay sold to her, and that it was only upon this express condition that the appellant agreed to sell the hay for the corn. Mrs. Lowry testified that she had purchased and used the hay in feeding her horses while she raised her crop of corn; that she had agreed to pay for the hay with corn in the fall; but she denied that she had agreed that appellant should go into the corn-field and gather the corn. The very decided preponderance of the evidence was with the appellant on this controverted point.

The appellant, with several hands and his wagon and team, went into the corn-field of Mrs. Lowry, to gather the corn in payment of the hay. Mrs. Lowry forbade the appellant from gathering the corn, but he disregarded her objection and remonstrance, and gathered and hauled away fifty bushels of corn, which was of less value than the hay.

For the taking of the corn under these circumstances, the

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appellant was prosecuted and convicted. The offence very closely assimilates itself to the crime of larceny. It would be larceny, but for the fact that the articles mentioned in said section are regarded as a part of the realty, they being attached to the soil. The appellant did not deny the taking of the corn, but he claimed that he had a license from Mrs. Lowry to enter upon her premises and pull and take away the corn. It was maintained on the part of the State, that, conceding that a license existed, it was revoked before the corn was gathered. Upon this point, the court instructed the jury as follows: "License may be granted by parol, and as long as a party is acting under such license, he will not be a trespasser, but such license may be revoked at any time. If the defendant entered upon the lands of the prosecuting witness, under a parol license, and before he gathered any corn, she forbid his gathering, and the defendant, after being so forbid, did gather and remove the said corn from the premises, without the consent of the prosecuting witness, the act was unlawful, and the defendant is liable."

If the license established and relied upon could be revoked at the pleasure of the licensor, then the instruction was correct; otherwise not.

A parol license that is not based upon a valid consideration and unconnected with any interest or vested right may be revoked at the pleasure of the licensor, but the rule is otherwise when it is coupled with an interest and supported by a valid consideration. The law is stated by a recent elementary writer thus: "A license cannot be revoked or withdrawn, as long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, placed, with his assent, where the continuance of the license is essential to its enjoyment. This is a branch of the rule that no one can withdraw a promise or declaration, made with the view of inducing others to act, after they have acted upon it, and thus placed themselves in a position where they must necessarily suffer, if it be withdrawn." Herman Estoppel, 437.

Highfill v. McMickle, Adm'r.

The power of revoking a parol license is very fully considered by this court, in *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534; and by the Court of Appeals in New York, in the very able and well considered opinion in the case of *Pierrepont v. Barnard*, 2 Seld. 279.

In our opinion, the court erred in giving the above instruction without any limitation or qualification, and in overruling the motion for a new trial; for upon the facts proved, the defendant was entitled to an acquittal. Mrs. Lowry had no right to withdraw her license, after she had induced the defendant to part with his property in reliance upon it.

The judgment is reversed; and the cause is remanded for a new trial.

F. N. Sims, for appellant.

B. W. Hanna, Attorney General, for the State.

HIGHFILL *v.* McMICKLE, ADMINISTRATOR.

INTEREST.—Statute.—Usury.—The interest law of March 9th, 1867, rendered valid contracts for interest at a greater rate than six per cent. made before its passage.

APPEAL from the Crawford Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellant on a promissory note executed by the defendant to the plaintiff's intestate. The answer, as to all of the amount of the note over and above six hundred and ninety-five dollars and eighty-three and a half cents, set up the defense of usury. The alleged illegal interest was at the rate of ten per cent. on notes which had been given prior to the 9th of March, 1867, the date of the present interest law, and included in the note sued upon. An able brief is submitted by counsel for the appellants, in which we are asked to re-

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view and overrule the decisions of this court holding that that act renders valid contracts for interest at a greater rate than six per cent. made before its passage. *Pattison v. Jenkins*, 33 Ind. 87; *Klingensmith v. Reed*, 31 Ind. 389; *Sparks v. Clapper*, 30 Ind. 204.

But the question is not so clear as to justify us in this course.

The judgment is affirmed, with costs and two per. cent. damages.

S. K. Wolfe, for appellant.

A. J. Simpson, for appellee.

SCOTT v. THE MOUNT AUBURN AND MARIETTA TURNPIKE COMPANY ET AL.

TURNPIKE.—*List of Lands*.—When assessors, appointed under the act of March 11th, 1867, to assess lands to aid in the construction of a turnpike, fail to include in the list, which they are required to make and return, all the lands within one mile and a half of the line and each terminus of the turnpike, an injunction will lie to prevent the collection of the assessment.

APPEAL from the Shelby Circuit Court.

DOWNNEY, J.—This was a complaint by the appellant against the appellees, to enjoin the collection of an assessment made for the construction of the road of said turnpike company, under the act of March 11th, 1867. The defendants demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, the plaintiff excepted, and final judgment was rendered against him, from which he appeals. The error assigned is the sustaining of the demur-rer to the complaint.

Among many other objections to the proceedings, it is alleged in the complaint, that the assessors of benefits did

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not view or make a list of all the lands within one and one-half miles of the line and termini of said road, but purposely and intentionally omitted from their said list, so returned, two thousand acres of land within such distance, and also the entire town of Marietta, at one terminus of said road, containing one hundred and twenty-four lots, all of which omitted real estate was of the value of two hundred thousand dollars, etc.

It has been decided by this court, in several cases, that where the assessors fail to include in the list which they are required to make and return, all the lands within the taxing district, that is, within one and one-half miles of the road on each side, and at each terminus, the assessment made by them cannot be sustained. *Hardwick v. The Danville, etc., Gravel Road Co.*, 33 Ind. 321; *The New Haven, etc., Turnpike Co. v. Bird*, 33 Ind. 325. Other cases have followed these.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court to overrule the demurrer, and for further proceedings.

O. F. Glessner, for appellant.

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THE STATE, EX REL. FULLHEART, *v.* BUCKLES, AUDITOR OF DELAWARE COUNTY.

SOLDIERS.—*Bounty.—Legalizing Act.*—The act of March 3d, 1865, to legalize county bonds and orders to pay volunteers' bounties, related back to the time the bonds and orders were issued, and made them valid as though the county boards had then possessed the power to issue them.

COUNTY COMMISSIONERS.—*Auditor.*—Where the board of county commissioners have the power to act in relation to a given matter, their acts are valid and binding, even though they may be erroneous, and the auditor cannot refuse to issue his warrant in accordance therewith, unless such acts are appealed from and legitimately annulled.

The State, *ex rel.* Fullheart, *v.* Buckles, Auditor of Delaware County.

SAME.—*Mandate.*—The writ of mandate is a proper remedy to compel the auditor to issue a warrant for money allowed by the board of county commissioners.

APPEAL from the Delaware Common Pleas.

WORDEN, J.—This was a petition for a writ of mandate by the appellant against the appellee, to require the latter to issue to the relator a warrant or order on the treasurer of said county. Demurrer to the petition for want of sufficient facts sustained, and exception.

Judgment for defendant. The question presented relates alone to the sufficiency of the petition. It alleges, in substance, that the board of commissioners of said county, at their December session, 1864, made and entered of record their order allowing and appropriating to the plaintiff the sum of one hundred dollars, to be paid from the funds of said county to the plaintiff on account of the enlistment and service of the plaintiff as a private in company "B" in the 36th regiment of volunteers, and in consideration of the plaintiff's being credited as such volunteer to said county of Delaware; that such enlistment of plaintiff was made under a call of the President of the United States for three hundred thousand volunteers, and was made at a time when the quota of said county, under said call, was not filled, and the plaintiff was credited as such volunteer in discharge and fulfilment of said quota; that afterward, to wit, at the December session of said board of commissioners, they made and entered of record their further order directing the auditor of said county to make out and deliver an order and warrant to the plaintiff, according to law, for said sum of money so allowed and appropriated as aforesaid; that the plaintiff has not received said order, though he has demanded the same of the auditor, who refuses to issue the same. Prayer for writ of mandate, etc.

We have no brief on behalf of the appellee, and are, therefore, not advised upon what ground the demurrer was sustained, except as we gather it from the appellant's brief.

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That the writ of mandate is a proper remedy in such case cannot be doubted. It is provided by statute (2 G. & H. 322, sec. 739), that "writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins; or, a duty resulting from an office, trust or station."

Do the facts alleged entitle the plaintiff to the warrant? We are of opinion that they do.

The orders of the board, when made, may have been void for want of power in the board to make them, but they were legalized by the act of March 3d, 1865, as has been held in a number of cases. This legislative ratification related back to the time the orders were made, and made them as valid as if the board had then possessed the necessary power. The board having made the orders in question, the one appropriating to the plaintiff the money, and the other directing the auditor to issue his warrant to the plaintiff therefor, we do not see how the auditor can question the action of the board, or refuse to issue the warrant. Any tax-payer might have appealed from the orders, but not having done so, they are binding, if the board had the power to make them, which we have seen they had by the relation back of the legislative ratification. As well might the auditor question any other allowance made by the board, and refuse to issue the proper warrant or order therefor. Independently of the ratifying act above mentioned, these orders of the board do not seem to be without authority. They may, perhaps, be regarded as making an allowance to the plaintiff of the sum mentioned, and the boards of commissioners may make allowances at their discretion. 1 G. & H. 64, sec. 7.

However this may be, the duty of the auditor in the premises is very plain. It is provided by statute that "he" (the auditor) "may also draw his warrant upon the treasurer for a sum allowed, or certified to be due by any court of record, authorized to use a seal, and having jurisdiction beyond that of justices of the peace; or by the board of county commissioners." 1 G. & H. 64, sec. 3. This statute is impera-

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tive. The word "may" will be construed as synonymous with "shall," where public interests and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised. *Bansemmer v. Mace*, 18 Ind. 27.

Here was an appropriation by the board of commissioners to the plaintiff of the sum of one hundred dollars, which the board had the power to make, and an order directing the auditor to issue his warrant therefor. These orders of the board are not appealed from, and, so far as appears, are in full force. The auditor cannot nullify them by refusing to issue the necessary warrant. He cannot question the propriety or legality of the acts of the board in this mode. Where the board have the power to act in relation to a given matter, their acts are valid and binding, even though they may be erroneous, unless appealed from or otherwise legitimately annulled.

We are of opinion that the court erred in sustaining the demurrer.

The judgment below is reversed, with costs, and the cause remanded, with instructions to proceed in accordance with this opinion.

BUSKIRK, C. J., having been of counsel in a somewhat similar case, did not participate in the decision in this cause.

F. Colerick and R. C. Bell, for appellant.

W. Brotherton and C. E. Shipley, for appellee.

SCOBY v. FINTON.

CONTRACT TO REMOVE LIEN ON LAND.—*Parties*.—Suit by A. against B. upon this instrument: "I obligate myself, in penalty of five hundred dollars, to remove the mortgage from the lot on Noble street, Indianapolis, this day con-

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140	227
39	275
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vveyed to" A., "within three months from this date;" dated, and signed by B. The complaint alleged that the mortgage remained a lien upon the lot, to the amount of two hundred and sixty-six dollars, in favor of The Indianapolis and Cincinnati Railroad Company, although more than three months had passed. Held, that the complaint was sufficient on demurrer, without an averment that the railroad company was attempting to enforce its lien, or that the plaintiff had paid the lien, or that he had been evicted; and also that the railroad company was not a necessary party.

EQUITABLE ASSIGNMENT OF JUDGMENT.—Set-Off Against Insolvent Holder.—

Parties.—Verification of Answer. — The defendant answered, that at the bringing of the suit, he was the equitable owner of certain judgments against the Indianapolis and Cincinnati Railroad Company, which had not been assigned on the judgment docket, and asked that the plaintiffs in said judgments be made parties to answer as to their interest; he also alleged that said railroad was insolvent, and asked that it be made a party, and his said judgments set off against the mortgage debt. A demurrer was sustained to this answer.

Held, that this was error. The answer did not require verification.

APPEAL from the Decatur Circuit Court.

BU SKIRK, C. J.—The appellee sued the appellant upon the following instrument:

"I obligate myself, in penalty of five hundred dollars, to remove the mortgage from the lot on Noble street, Indianapolis, this day conveyed to Timothy Finton, within three months from this date.

"August 6th, 1870.

JOHN S. SCOBEX."

It was averred in the complaint, that the parties to the action, in August, 1870, made an exchange of certain real estate; that the property traded by the appellee was situated in Greensburg, Decatur county, Indiana, while the property traded by the appellant was situated in Indianapolis, Indiana; that the Indianapolis property was conveyed to the appellant by John Withers, who had purchased the same from The Indianapolis and Cincinnati Railroad Company, and yet owed upon it the sum of two hundred and sixty-six dollars, for which the railroad company held his note, secured by a mortgage on the property; that each of the parties had executed warranty deeds for the property traded; that the appellant, in consideration of the premises, executed the bond above set out; that the appellant had failed to remove the

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mortgage on the said property, although more than three months had elapsed since the execution of the above agreement. The prayer of the complaint was as follows: "And the plaintiff wants it removed from said premises, and demands judgment for five hundred dollars and costs, according to the terms of the said contract, and all other proper relief."

The appellant demurred to the complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action, and that there was a defect of parties, in this, that The Indianapolis and Cincinnati Railroad Company was not made a defendant. The court overruled the demurrer, to which the appellant excepted.

The appellant then answered in two paragraphs. A demurrer was sustained to each paragraph of the answer, to which ruling the appellant excepted.

The appellant refusing to plead further, the cause was submitted to the court for trial, and resulted in a finding for the plaintiff.

The court thereupon rendered the following judgment:

"It is therefore considered by the court that said plaintiff recover of and from the said defendant the said sum of three hundred and thirty-eight dollars and twenty cents, the damages by the court as aforesaid assessed, together with his costs and charges by him about his suit herein paid out and expended, to be collected without relief from valuation or appraisement laws of Indiana; and it is further ordered and considered by the court that a satisfaction of the mortgage and note set out in the complaint herein by said defendant, before the collection of this judgment, will be a satisfaction of the principal and interest of this judgment."

The appellant did not move for a new trial, but entered an objection and exception to all of the judgment, without pointing out any specific objection, or making any motion to correct or modify the same.

The first error assigned is based upon the action of the court in overruling the demurrer to the complaint.

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The appellant has urged the following objections to the complaint: First. That it was not averred that the railroad company had been or was attempting to enforce her lien upon the lot. Second. It does not appear that the appellee had paid the mortgage on the said lot, or that it had been demanded of him, or that the railroad company was even threatening to foreclose said mortgage. Third. It does not aver that the appellee had been evicted, or that any attempt had been made in that direction. Fourth. The railroad company was not made a defendant. Fifth. That the prayer for relief is defective, in this, that it only expresses the desire of the plaintiff to have the incumbrance removed, and demands judgment for five hundred dollars, according to the terms of the contract sued on.

Did the complaint state facts sufficient to constitute a cause of action? If the action was based upon the covenants in the deed, the complaint would be defective for not averring, either that the plaintiff had removed the incumbrance, or had been evicted from the premises; but the action is based solely and exclusively upon the obligation of the appellant. The decisions of this court have not been uniform, upon the question of whether the plaintiff could maintain an action upon the obligation on which this action is based, without averring either payment or eviction.

It was held by this court, in the cases of *Schooley v. Stoops*, 4 Ind. 130, and *Tate v. Booe*, 9 Ind. 13, that in an action on such a bond, the plaintiff could only recover nominal damages, unless real and substantial damages were shown to exist, either by alleging and proving payment or eviction. The opposite principle was enunciated in the cases of *Kirk v. The Fort Wayne Gaslight Co.*, 13 Ind. 56, and *Merritt v. Wells*, 18 Ind. 171. In *Johnson v. Britton*, 23 Ind. 105, the two cases last cited were reviewed and adhered to. A petition for a rehearing was filed, and before it was acted on, a change of the judges of this court took place. The late judges of this court acted on the petition. To them was presented the question of whether they would adhere to the

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cases reported in the 4th and 9th Indiana Reports, or those reported in vols. 13 and 18. After reviewing the English and American cases bearing on the question, they overruled the first two cases, and adhered to the two later cases.

After careful consideration of the question, we have concluded to adhere to the ruling in *Johnson v. Britton, supra*; and thus holding, it necessarily results that the court committed no error in overruling the demurrer to the complaint.

The next question presented for our decision is, whether the court erred in sustaining the demurrer to the first and second paragraphs of the answer. The first and second were in substance the same, but the second was much fuller than the first, and was pleaded as a cross complaint. We will, therefore, set out the substance of the second paragraph.

It was alleged, that the Indianapolis property was purchased of the railroad company by John Withers, who owed thereon the sum of two hundred and sixty-six dollars, which was secured by a mortgage on the said property; that when the appellant purchased said property from said Withers, he agreed, in writing, to assume and pay the said mortgage; that when he sold the same to the appellee, he agreed, in the instrument above set out, to pay and remove such mortgage within ninety days; that Solomon Sharpe, George D. Miller, and Vinton Warner had recovered separate judgments against the said railroad company, which in the aggregate amounted to one hundred and fifty dollars; that before the commencement of the said action, the appellant had become the owner, by purchase, of said judgments; that the same had not been assigned to him by a regular assignment thereon; that the said judgments were wholly unpaid and justly due; that the said railroad company was, at the several times when the said judgments were rendered, and then was, hopelessly insolvent. The prayer was, that the said Sharpe, Miller, and Warner should be made defendants, to answer to their interests in the said judgments, and that the said railroad company should be made a defendant; and that upon the final

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hearing of the said cause, the court should set off against the claim of the plaintiff the amount due from the railroad company to the appellant upon said judgments.

It is maintained by the appellee that the answer was defective, because it was not sworn to. It is insisted, that the facts stated brought it within the 23d section of the code, 2 G. & H. 54. We do not think so. That section provides for substituting a new defendant for the one sued. The facts stated bring it clearly within section 22 of the code.

It is next insisted that the answer was defective, for the reason that the assignment of the judgments was alleged to be by parol, and not in writing on the judgments, and properly attested by the officer who was the custodian of the record. The position assumed is, that a judgment cannot be assigned by parol, but must be assigned in the manner provided in the act found on page 366, 2 G. & H. We are of a different opinion. It was decided by this court, in *Wood v. Wallace*, 24 Ind. 226, that there could be, in equity, a valid assignment of a judgment by parol. We adhere to that decision.

It remains to be considered whether the court erred in refusing to make the railroad company and the assignors of the judgments, pleaded as set-offs, parties to the action. If the appellant was entitled to a set-off, then he had the right to have the necessary parties before the court. The judgments having been assigned by parol, it was necessary to make the assignors parties, to answer to their interests in the judgments.

The railroad company was entitled to the money secured by the mortgage and mentioned in the bond sued on. The appellee had no right to, or interest in, the money. If it was paid to him, he would hold it in trust for the railroad company. The only interest the appellee had in the suit was to have the incumbrance removed from his land. The appellant was interested in having the money paid to the railroad company, for if the property was sold upon a foreclosure of the mortgage, and the appellee was evicted, then

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he would be liable upon the covenants of his deed to the appellee. It was alleged in the answer that the railroad company was insolvent. If the appellant was compelled to pay the full amount of the mortgage to appellee, and he paid it to the railroad company, then the appellant would be deprived of the benefit of a set-off. His judgments would be worthless to him. The railroad company would receive its debt in full, while it would pay no part of its indebtedness to the appellant. There would be neither justice nor equity in this.

It is provided in section 22 of the code, 2 G. & H. 53, that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the court must cause them to be joined as proper parties."

It was held by this court, in *Frear v. Bryan*, 12 Ind. 343, that a new party should not be made merely for the purpose of settling matters between that new party and the defendant, in which the original plaintiff had no interest. That decision was manifestly correct, but it does not apply in a case like this, for we have shown that there was a unity of interest between the plaintiff and the railroad company, and that there could not be a complete determination of the matters in controversy without the presence of such company. Full and complete justice could not be done in her absence. *Luark v. Malone*, 34 Ind. 444; *Merritt v. Wells*, 18 Ind. 171.

By section 18 of the code, 2 G. & H. 46, it is provided, that "any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved."

As we have already seen, the money sought to be recovered belonged to the railroad company. Suppose the appellee was insolvent. Would there be either justice or

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equity in permitting him to get the money in his hands? We think not. The doctrine, as laid down in *Johnson v. Britton, supra*, is an innovation upon the common law, and would result in great "inconvenience and serious hardships," if the courts of this State were not bound to protect the equitable as well as the legal rights of parties.

We are very clearly of the opinion, that the court erred in sustaining the demurrer to the cross complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

J. S. Scobey and O. B. Scobey, for appellant.

C. Ewing and J. K. Ewing, for appellee.

THE CITY OF INDIANAPOLIS *v.* TATE.

CITY.—*Drainage.*—The same questions are raised in this case as in the case of *The City of Indianapolis v. Lawyer*, 38 Ind. 348, and the decision is the same.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This was an action brought by Tate against the City of Indianapolis, to recover damages for an alleged overflow of his premises by reason of a defective sewer.

The complaint alleges that the plaintiff was the owner of, and in possession of, certain real estate in said city; that he had erected thereon a large planing mill, and door and sash factory, while on the rear part thereof he had erected three large drying houses, in which he dried or seasoned lumber used in the factory; that the common council had established and constructed a system of drainage and sewerage by which all the water north of Washington street, east of Pennsylvania to East street, and as far north as the limits of

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the city extend, being a space of six hundred acres, was drained and made to pass down the west side of New Jersey street, in front of plaintiff's lumber yard and factory, through a covered drain or sewer under the railroad tracks, into Pogue's Run; that said council and engineers also established and fixed the grade of the street and sidewalk on South New Jersey street, in front of plaintiff's property, some two feet above the surface of his lots; that the defendant so negligently and unskillfully built, provided, and established the drain or sewer passing in front of his property, that said drain or ditch leading to the covered sewer under the railroad tracks was wholly insufficient to conduct and carry away the water that was carried into it as mentioned; that the said covered sewer passing into Pogue's Run under the railroad tracks was so small and so negligently built and constructed, that the great amount of water that was brought to it during heavy rains, by means of the said system of drains and sewers, could not pass out into the run; that the grade of the railroad tracks was fixed by the said council and engineers, and was then under the power and control of said council, and was so much higher than the sidewalk on the west side of New Jersey street as mentioned, that the water was thrown back, and over the sidewalk into and over plaintiff's premises; that said drain and sewer were so negligently and unskillfully built, that they failed to perform the office for which they were constructed; that by reason of the insufficiency of said drain and sewer, said plaintiff's premises were repeatedly overflowed with water, without the fault of the plaintiff, to wit, on the following days: at every ordinary rain for two years prior to the beginning of this action, the precise date of which cannot be given, and at other times; that at each flood, the plaintiff's factory and the machinery therein were injured, while the lumber in said factory and in the drying houses was spoiled and greatly injured, and the fires in his drying houses put out, and the furnaces destroyed, and he was at each time compelled to stop work in his factory for several days, there-

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by losing large profits, namely, three thousand dollars, for which he prays judgment.

The second paragraph is substantially the same as the first, only more particularly setting forth the alleged injuries, and the manner of their occurrence.

The defendant pleaded the general denial and several other paragraphs of answer, which need not be further noticed. There was a trial by jury, and a general verdict for the plaintiff, and answers to interrogatories, on which, notwithstanding a motion by the defendant for a new trial, the court rendered final judgment for the plaintiff.

The only error assigned in this court is the refusal of the common pleas to grant a new trial.

This case is like the case of *The City of Indianapolis v. Lawyer*, 38 Ind. 348, except that in that case there was a demurrer to the evidence, and in this the question is upon the sufficiency of the evidence to justify the verdict of the jury.

The questions in the two cases are the same, and they must be decided in the same way.

The judgment is affirmed, with costs.

F. S. Harvey, for appellant.

F. T. Dye and A. C. Harris, for appellee.

STONE *v.* THE BROOKVILLE NATIONAL BANK.

BANKRUPTCY.—*Pleading.*—Where a creditor has not proved his debt in bankruptcy, the pendency of a petition in bankruptcy, before the debtor's final discharge, cannot be pleaded in bar of an action to recover the debt.

SAME.—*Stay of Proceedings.*—Pending proceedings in bankruptcy, an action on a provable claim may be stayed on the application of the bankrupt.

SAME.—The court in which proceedings in bankruptcy are pending is a proper court to order the stay of proceedings.

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SAME.—It is not the duty of a state court to stay proceedings on being advised that the debtor has filed his petition in bankruptcy.

APPEAL from the Franklin Circuit Court.

WORDEN, J.—Action by the appellee against the appellant and one Samuel Cameron, as makers, and Jacob H. Masters, as indorser, of a promissory note indorsed by Masters, the payee, to the plaintiff. There was judgment against all the defendants. Stone alone appeals.

The appellant answered in one paragraph only, which is as follows: "The defendant Stone, for a separate answer," etc., "says that, after the contract named in the said paragraphs was executed, to wit, on the 18th of November, 1868, he filed his petition in bankruptcy before J. B. McFadden, a register in bankruptcy for the district of Indiana, and was, on said day, duly adjudicated a bankrupt by said register; that said matter of bankruptcy is still pending for the filing and settlement of claims owing by said Stone at the time of filing said petition; that the matters of indebtedness named in said paragraphs accrued before the filing of said petition, and are proper claims to be filed in said proceedings in bankruptcy, and are provable in said proceedings in bankruptcy; and said defendant says that the plaintiff cannot maintain this cause of action against him."

A demurrer was sustained to this answer, for the want of sufficient facts, and Stone excepted, and failing to answer further, final judgment was rendered against him on the demurrer. He moved for a new trial, but no question is raised thereby. The only question legitimately presented by the record is that presented by the ruling on the demurrer.

It is objected by the appellee, amongst other things, that the answer does not show that any proceedings in bankruptcy had been instituted by the appellant; in other words, that proceedings in bankruptcy are not commenced until the petition is filed in the office of the clerk of the proper district court; that the filing of the same with the register is not sufficient. We shall pass this objection, as the answer is otherwise fatally defective.

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The twenty-first section of the bankrupt act provides, "that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby.

"And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined. And any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

It will be observed that the answer in question does not aver that the plaintiff had proved her debt in the proceedings in bankruptcy.

Where a creditor has not, as in this case, proved his debt in bankruptcy, we think it quite clear that the pendency of the petition in bankruptcy, and before the debtor's final discharge, cannot be pleaded in bar of an action to recover the claim.

An answer in bar of an action, if good and sustained, defeats the action finally and forever. If the answer in question were to be held good, the appellant would be forever discharged from his obligation to pay the note, whether he ever procured a discharge in bankruptcy or not.

The answer was clearly defective, and the demurrer correctly sustained.

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The bankrupt act provides an ample remedy in such cases. Pending the proceedings in bankruptcy, an action on a provable claim may be stayed "on the application of a bankrupt." The court in which the proceedings in bankruptcy are pending is a proper court to order the stay of proceedings. 4 Bump Bankrup. 378, note c. Whether a state court might not stay the proceedings on a proper application, without any order of the court in bankruptcy, is a question not before us, and we intmate no opinion upon it.

The answer in question was no application to stay proceedings. No application was made to the court below to stay the proceedings. The counsel for the appellant argues the case as if it were the duty of the court to stay proceedings upon being advised that the appellant had filed his petition in bankruptcy, whether asked to do so or not. We are of a different opinion. Courts seldom act as counsel for parties, or thrust legal rights upon them. It is the duty of counsel to present the causes of their clients, and of the courts to pass upon such matters as are presented.

It is assigned for error that execution on the judgment was not ordered to be stayed. The case was not within the terms of the bankrupt act, by which a cause may be allowed to proceed, for the purpose of ascertaining the amount due, by leave of the court in bankruptcy. The amount was not in dispute, nor had the court in bankruptcy made any order in the premises. The court below was not asked to make an order for the stay of execution, nor was any exception taken to the action of the court in this respect.

The judgment below is affirmed, with costs.

R. Tyler, for appellant.

C. C. Binkley, for appellee.

Dudley *et al.* v. The Blountsville and Windsor Turnpike Company.

DUDLEY ET AL. v. THE BLOUNTSVILLE AND WINDSOR TURNPIKE COMPANY.

COUNTY COMMISSIONERS.—*Appeal.*—No appeal lies from the decision of a board of county commissioners upon an application of a turnpike company for leave to construct its road along a public highway.

APPEAL from the Randolph Common Pleas.

PETTIT, J.—The appellee petitioned the board of commissioners of Randolph county for leave to construct its turnpike over, on, and along a certain public highway in that county, under section 4, I G. & H. 475. The appellants appeared before the board, and filed a remonstrance against granting the prayer of the petition. The board, after hearing evidence, refused to consent that the highway might be used by the company for the construction of its turnpike. The appellee appealed to the court of common pleas, in which court the appellants moved to dismiss the appeal for want of jurisdiction, there being no appeal from the exercise of a mere discretion vested in the board. This motion was overruled, and exception taken. There was a trial, and judgment for the company, giving it the right to use the highway for the construction of its turnpike, notwithstanding the refusal of the board of commissioners. The overruling of the motion to dismiss the appeal is assigned for error.

We hold that the section above referred to vests a mere discretion in the board of commissioners, that no other body, court, or tribunal can exercise, control, or direct; and from the exercise of which, either way, no appeal lies to any court. The language of the law, and the nature of the case, alike warrant this conclusion.

The judgment is reversed, at the costs of the appellee, with instructions to the court to dismiss the appeal for want of jurisdiction.

T. M. Browne, for appellants.

F. F. Cheney and E. L. Watson, for appellee.

Manlove, Receiver, v. Naw.

MANLOVE, RECEIVER, v. NAW.

RECEIVER.—Insurance Company.—Complaint.—In a suit by a receiver of a mutual insurance company, against a member of the company, for his proportion of losses, the complaint must show that the losses which are to be paid with the money to be collected from the assessments occurred during the time the defendant was a policy holder and member of the company.

APPEAL from the Vanderburg Circuit Court.

DOWNY, J.—This was an action by Manlove, as Receiver of the Farmers and Merchants' Insurance Company, a mutual insurance company, against Naw, commenced before a justice of the peace. There was a judgment for the plaintiff before the justice of the peace, but on appeal to the circuit court, a demurrer to the complaint was sustained, because it did not state facts sufficient, and final judgment was rendered for the defendant.

According to several decisions of this court, this ruling was correct. It has been held in this court, that a person becoming a member of a mutual insurance company, by insuring therein, is liable for his proportionate share of the losses which may occur while he is a member; that is, for the time during which his policy runs, and no longer. It is necessary, therefore, to show, among other things, that the losses which are to be paid with the money to be collected from the assessments occurred during the time the defendant was a policy holder and member of the company. The complaint in this case is liable to the objection that it does not show this, and perhaps is liable to other objections also. See *Embree v. Shideler*, 36 Ind. 423; *Manlove v. Naylor*, 38 Ind. 424.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

J. R. Troxell, W. R. Manlove, and R. A. Hill, for appellant.

C. Denby, D. B. Kumler, P. Maier, J. E. McDonald, and E. M. McDonald, for appellee.

Ray et al. v. The Indianapolis Insurance Company.

RAY ET AL. v. THE INDIANAPOLIS INSURANCE COMPANY.

NEW TRIAL.—Cause.—That the court erred in sustaining a demurrer to an answer, is not a cause for granting a new trial.

CORPORATION.—Estopel.—A party who contracts with a corporation, as such, is precluded from questioning the organization of the corporation.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This action was brought by the appellee against the appellants, to foreclose a mortgage executed to it, by the appellants, to secure the payment of a promissory note made by appellant Martin M. Ray to the appellee. The defendants answered; the plaintiff replied; the cause was tried by the court; there was a finding for the plaintiff; motion for a new trial overruled; and judgment rendered on the finding.

The errors assigned in this court, stating them in our own order, are, first, the overruling of the demurrs of the defendants to the complaint; second, the sustaining of the demurrs of the plaintiff to the several paragraphs of the answer of the defendants; third, the striking out of the paragraphs of the answer; fourth, error of the court in its conclusions of law upon its special findings; fifth, the refusal to grant a new trial.

No particular defect in the complaint is pointed out. It seems to us to be sufficient.

There is no question in the record relating to the sufficiency of the answers as last amended and filed.

The last answers filed were not stricken out, but were on file when the case was tried.

There was no legal and proper special finding by the court, nor any conclusions of law stated.

The new trial was asked for the reasons, first, that the court erred in sustaining the demurrs to the second, third, and fourth paragraphs of the answer; second, the court erred in refusing to allow the defendants to prove that the plaintiff was not organized as a corporation; third, in finding

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too much for the plaintiff; fourth, in its conclusions of law; and, fifth, in rendering judgment for the amount of the finding and costs.

The first reason assigned is not a cause for granting a new trial. Second, there was no error in refusing to allow the defendants to prove that the plaintiff had not been organized as a corporation. By making the contract with the company, as a corporation, they precluded themselves from questioning that fact. 2 Davis Ind. Dig. 191, sec. 27. Third, there is nothing in the bill of exceptions to show that the finding was excessive. Fourth, there were no conclusions of law stated by the court; and if there had been, and they were wrong, this was no reason for a new trial. Fifth, the judgment is in proper form, so far as we can see. The motion for a new trial was properly overruled.

The judgment is affirmed, with two per cent. damages and costs, as of the November term, 1871, when it was submitted, the said Martin M. Ray having since then departed this life.

M. M. Ray, H. C. Ray, W. L. Ray, G. H. Voss, B. F. Davis, and J. A. Holman, for appellants.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellee.

VANKEUREN ET AL. *v.* HOWARD.

PRACTICE.—*Motion for New Trial.—Reasons.*—“That the court erred on said trial in the rejection of evidence offered by the defendant, which ought to have been received,” and “that the court erred in receiving evidence on the part of the plaintiff, which was objected to by the defendant, and which ought to have been rejected,” as statements of reasons for a new trial, are too vague and indefinite to be considered on appeal.

APPEAL from the Clay Common Pleas.

PETTIT, J.—The appellee sued the appellants for malicious

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prosecution in procuring him to be arrested on a charge of larceny in stealing a horse and buggy.

Answer of general denial, trial by jury, verdict for appellee for two hundred and forty-five dollars, motion for new trial overruled, and judgment on the verdict. The only error properly assigned is the overruling of the motion for a new trial. The reasons for a new trial are, "first, that the damages are excessive; second, that the verdict is not sustained by sufficient evidence; third, that the verdict is contrary to law; fourth, that the court erred on said trial in the rejection of evidence, offered by the defendants, which ought to have been received; fifth, that the court erred in receiving evidence on the part of the plaintiff, which was objected to by defendants, and which ought to have been rejected."

As to the first and second causes, we have only to say that we have carefully examined the evidence, and are far from being able to see or believe that the damages are excessive, or that the verdict is not sustained by sufficient evidence. As to the third reason, no law that the verdict contravenes has been pointed out, and we know of none. As to the fourth reason, it is too vague and indefinite. It should have pointed out, and called the attention of the court directly to, what evidence was rejected, which should have been received. We have often repeated this ruling, and elaborated the reason of it, and we do not deem it necessary to do so again, further than to say that a different practice might do great injustice to the court and the opposite party. As to the fifth, it is equally bad as the fourth, in not pointing out what evidence was received, which ought to have been rejected; but this reason is assigned as and for error, and is expressly waived and abandoned, as having no merit, in the appellants' brief.

Both of the defendants joined in the motion above considered, yet Richardson filed a separate motion for a new trial, on his own behalf, for these reasons: "first, that the

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verdict is not sustained by any evidence as to him; second, that the verdict is contrary to law as to him."

This motion was overruled, and exception taken, but no separate assignment of error is made by Richardson for overruling his motion; but if there had been, the result must have been the same, as the evidence clearly shows he was the instigator and prime mover in causing the arrest of the appellee, not because he was guilty, but to detain him to find out what another man had done with the horse and buggy.

We hold that the court committed no error, that we can notice, in overruling the motions for a new trial.

The judgment is, in all things, affirmed, at the costs of the appellants.

G. A. Knight, G. P. Stone, E. Miles, and A. T. Rose, for appellants.

S. W. Curtis, E. M. Compton, W. W. Carter, and S. D. Coffey, for appellee.

BARNES v. WRIGHT ET AL.

DEFAULT.—*Judgment.*—Where a defendant has been brought into court, and has suffered a judgment to be rendered against him by default, he cannot appeal to the Supreme Court for the correction of any supposed error in the judgment, without having first applied to the court below for the correction.

APPEAL from the Grant Common Pleas.

WORDEN, J.—This was an action by the appellees against the appellant upon a promissory note.

The defendant was duly brought into court by the service of a summons, and there was judgment against him by default. The note stipulated for the payment of attorney's fees, if suit should be brought thereon, and it was averred in the complaint that the attorney's fees were of the reasonable value of forty dollars. The judgment was rendered for a little over

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ten dollars too much, adding the forty dollars, for attorney's fees, to the principal and interest of the note. But there were no steps taken in the court below to correct this error in the computation. It might have been there corrected without coming to this court. Where the defendant has been brought into court, and has suffered a judgment to be rendered against him by default, he cannot appeal to this court for the correction of any supposed error in the judgment, without having first applied to the court below for the correction.

This has been settled in a large number of cases. It will be sufficient to refer to the following: *Darlington v. Warner*, 14 Ind. 449; *Sturgis v. Rodman*, 14 Ind. 604; *Durbon v. Connor*, 15 Ind. 433. In *Skeen v. Huntington*, 25 Ind. 510, the rule was applied to a case where there was a question as to the sufficiency of service.

But the appellees having in this court remitted the amount of ten dollars and sixty-five cents of the judgment below, the residue of the judgment below is affirmed, with costs.

J. Brownlee and H. Brownlee for appellant.

A. Steele and R. T. St. John for appellees.

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140 438

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JUDGMENT BY DEFAULT.—Practice.—Appeal.—Where a judgment has been taken by default, the defendants having been personally served, a motion to set aside the default, showing merits in the defence, or proceedings for relief from the judgment, or to review it, must be made in the court below, before appeal.

PRACTICE.—Pleading.—Misnomer.—Amendment.—A complaint upon a promissory note, containing a misnomer or an omission to set out the full name, where the summons contains the full name and has been duly served, may be amended to correspond with the summons; and on appeal, this court will consider the amendment as made.

APPEAL from the Grant Common Pleas.

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BUSKIRK, C. J.—This was an action by the appellee against the appellants, upon a promissory note executed by the appellants to George W. White, who indorsed the same to the appellee.

The appellants failing to appear to the action, they were called and defaulted, and judgment was rendered on such default.

There was no motion in the court below to set aside the default or for a new trial; nor was there any objection taken to the form of the judgment.

The appellants have assigned the following errors: first, the judgment is against Joshua Barnes and Benjamin H. Barnes, when the complaint is against Joshua Barnes and B. H. Barnes, without any averment that Benjamin Barnes is intended; second, there is no complaint against Benjamin H. Barnes; third, the complaint does not contain copies of note and assignment; fourth, the service and return is not made a part of the record.

The note was executed by Joshua and B. H. Barnes. The complaint was against Joshua and B. H. Barnes. The summons was against Joshua and Benjamin H. Barnes and was served on them by such names; and the judgment was rendered against them as described in the summons.

When a judgment has been taken by default, where the defendants were personally served, a motion to set aside the default, showing merits in the defence, or proceedings for relief from the judgment, or to review it, must be made in the court below before an appeal to this court, or no question will be presented for our decision. *Blair v. Davis*, 9 Ind. 236; *Harlan v. Edwards*, 13 Ind. 430; *Frasier v. Hubble*, 13 Ind. 432; *Kirby v. Robbins*, 13 Ind. 470; *Gray v. Dickey*, 20 Ind. 96; *De Armond v. Adams*, 25 Ind. 455; *Skeen v. Huntington*, 25 Ind. 510; *Nutting v. Losance*, 27 Ind. 37; *Goldsberry v. Carter*, 28 Ind. 59; *Ratliff v. Baldwin*, 29 Ind. 16; *Clegg v. Fithian*, 32 Ind. 90; *Clegg v. Patterson*, 32 Ind. 135; *Monroe v. Strader*, 33 Ind. 111.

The complaint will be regarded as sufficient in this case.

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The appellee had the right to amend the complaint to correspond with the summons, and we will presume it was done, and treat it as made.

The note and indorsement were filed with, and constituted a part of, the complaint.

The summons and the return thereon are made a part of the record by section 559, 2 G. & H. 273, in cases of default, and they were copied into the record and show that appellants were duly and legally served.

We have been unable to see any merits in this appeal.

The judgment is affirmed, with costs and ten per cent. damages.

F. Brownlee and H. Brownlee, for appellants.

M. M. Ray, G. H. Voss, B. F. Davis and F. A. Holman, for appellee.

ATKINSON ET AL. v. LINDSEY.

VENDOR'S LIEN.—*Estoppel.—Failure to Demur.*—A. sought to enforce a vendor's lien against land owned by D. A. sold the land, January, 1857, to B.; B. sold it June, 1857, to C.; C. sold it December, 1865, to D. The suit was commenced in June, 1869. D. answered that the plaintiff was estopped from claiming his lien, because before he, D., purchased and paid for the land, he made inquiry of the plaintiff, whether it would be all right, and was advised by him to proceed with the purchase. Issue was taken on this by a denial.

Held, that the failure to demur waived the question as to the sufficiency of the facts stated to constitute an estoppel, and that on proof of the allegations the defendant was entitled to a verdict.

APPEAL from the Warren Common Pleas.

WORDEN, J.—This was a complaint by the appellee against the appellants, to enforce a vendor's lien on real estate. The land had been sold by Lindsey to Hiram Kearns, and by the latter to Robert M. Atkinson, who sold it to Cephas Atkinson. Lindsey seeks to enforce his lien upon the land in the hands of Cephas Atkinson.

The deed from Lindsey to Kearns was dated January 14th,

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1857. That from Kearns to Robert M. Atkinson was dated June 9th, 1857. And that from Robert M. to Cephas Atkinson was dated December 5th, 1865.

This suit was commenced on the 24th of June, 1869.

Among other pleadings in the cause, the defendant Robert M. Atkinson pleaded, second, that the plaintiff was estopped from setting up any lien upon the land, for the reason that before he purchased and paid for the land, he made inquiry of the plaintiff whether it would be right, etc., and was told by the plaintiff, that it would be right, and to go on and make the purchase; third, that for a valuable consideration the plaintiff, by parol, released and relinquished his supposed lien upon the land.

Issue, trial, verdict, and judgment for the plaintiff, a motion for a new trial made by the defendants being overruled, and exception taken.

The defendants bring the case here upon the evidence, which, upon a careful examination thereof, we think fails to sustain the verdict.

The proof, to bring home notice to Cephas Atkinson of the fact that the purchase-money or any part of it, due from Kearns to Lindsey, remained unpaid at the time Cephas purchased from Robert, is quite unsatisfactory. It is shown that in the spring or summer after Lindsey conveyed to Kearns, Cephas was informed and knew that a portion of the purchase-money remained unpaid. But Cephas did not purchase the property until December, 1865. In the meantime, the property had been conveyed by Kearns to Robert M. Atkinson. Cephas testifies that at the time he bought and paid for the land, he had no notice of any claim for unpaid purchase-money in favor of Lindsey. If the case turned entirely upon this point, we should be inclined to look carefully to the question whether such notice to Cephas would be sufficient, before deciding it. As at present advised, we are not satisfied that such notice would be sufficient; but we decide nothing upon the point, as there is another ground upon which the judgment must be reversed. We are of opin-

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ion that the estoppel pleaded was fairly made out by the evidence, and we find no evidence in the record rebutting or contradicting it.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

ON PETITION FOR A REHEARING.

WORDEN, J.—In this case the counsel for the appellee have filed a zealous petition for a rehearing, in which they assume that "the court has been evidently misled as to the facts disclosed by the record," and they gratuitously add that they "are charitable enough to attribute the oversight or error, of which they complain, to the overcrowded condition of the docket and the overworked condition of the court."

The evidence was all quite fully considered by the entire court upon the original decision of the cause, and the court was fully advised as to all the facts disclosed by the record; indeed, the case was fully considered on two or three occasions before a conclusion was finally arrived at, and as much time was consumed in its consideration as if there had been no other pressing business upon the docket; hence the mantle of charity, which the counsel thus volunteer to throw around the decision, does not belong where they seek to place it.

It will be seen, by recurring to the original opinion, that the judgment below was reversed on the ground that the answer of estoppel filed by Robert M. Atkinson was sustained by the evidence, and that there was no evidence conflicting with that sustaining the answer in question. The paragraph of the answer in question alleges, amongst other things, "that on or about the 1st day of June, 1857, this defendant entered into negotiations to purchase ninety acres of said lands, and that, before doing so, this defendant applied to the plaintiff to know if this defendant would be safe in making such purchase, and paying for said lands to said Hiram Kearns; that, thereupon, plaintiff informed this defendant that he, plaintiff, had no objection to such purchase

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and payment therefor; that he, the plaintiff, had made his trade, and that he, the defendant, could go on and make his trade for the land; and thereupon this defendant, relying on said answer and information of the plaintiff, purchased ninety acres of the land and took a conveyance therefor," etc.

Replication in denial.

The deed to Robert M. Atkinson, bearing date June 9th, 1857, was given in evidence. In reference to the estoppel pleaded, he testified as follows: "I am one of the defendants; I live in Benton county, Indiana; am a farmer; have lived in Benton county since November 15th, 1848; the plaintiff Lindsey is an uncle of mine; he is a half brother to my mother. In the winter of 1857, I lived near Oxford, and about a mile from Lindsey's; I knew Lindsey had sold his farm to Kearns, who was then trading in lands, cattle, hogs, etc.; as near as I can recollect about dates, after Kearns had bought the land, he was wanting to sell it to me; I told him I did not want to trade for the lands until he and Lindsey got their trade all fixed up; afterward the plaintiff came out from Howard county to Benton, he having moved away in the meantime, and we were talking about the matter, and he told me to go ahead and make my trade, that he had made his; I told him I was going to trade for the land, and asked him if it was all right; this was about the time the cattle were delivered to Newton Morgan, about the last of April, or first of May, 1857, I won't be sure which; about the time the cattle were delivered, the plaintiff told me to go ahead and make my trade, as he had made his; I paid about twenty-five dollars per acre. * * * Kearns was wanting to dicker with me; he spoke about trading perhaps fifty times; indeed, every time he passed, he had been wanting to trade me the land; and then Lindsey came out and said I could go on and make my trade with Kearns; this I think was in April, or the forepart of May following the sale by Lindsey to Kearns; I can't say when I next saw Lindsey after this; we were good friends, and are yet; he

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would always come to my house when he came out to Benton, and I did all I could for him."

This evidence, it seems to us, substantially and clearly makes out the truth of the paragraph of the answer in question; in other words, it proves the estoppel as pleaded. Now there is not a syllable of evidence in the record that contradicts the statements thus made by the defendant Robert M. Atkinson, unless it be the statement of Lindsey, that he was in Benton county June 1st, 1857, but not in April or May of that year. Although Lindsey was put upon the witness stand and testified after the above testimony of Robert M. Atkinson had been given, yet he did not deny the above matters testified to by Robert M. Atkinson, nor any part of them, nor was he at all interrogated on that subject. Nor was there any doubt of the truth of the statements of Robert M. Atkinson, as above set out, raised by any evidence or circumstance in the cause. Lindsey says, to be sure, he was not in Benton county either in April or May, 1857, but was there June 1st of that year. Robert M. Atkinson thinks the matters testified to by him, as above set out, occurred in April or May of that year. This is a mere discrepancy as to dates. The material facts testified to by Robert M. Atkinson, in respect to the matter above stated, stand unrebutted and uncontradicted. The issue formed on the paragraph of the answer should undoubtedly have been found for the defendants below.

But it is now insisted that the matters thus pleaded and proved do not constitute a valid estoppel.

If the appellee had wished to raise that question, he should have demurred to the paragraph of the answer setting up the supposed defence. This was not done. The answer, we think, was shown to be true in point of fact. If insufficient in law, the objection was waived by failing to demur. 2 G. & H. 92, sec. 64.

The petition for a rehearing is overruled.

H. W. Chase and J. A. Wilstack, for appellants.

L. E. McReynolds and J. McCabe, for appellee.

Hall v. The State, ex rel. Robinson et al.

HALL v. THE STATE, EX REL. ROBINSON ET AL.

WITNESS.—Administrator.—Where suit was brought on an official bond against the principal and a surety and the administrator of a deceased surety, and the process was returned, as to the administrator, "not found," and no steps were taken to have the cause continued as to such administrator for further process, and the plaintiff proceeded to trial as to the other defendants, the suit abated as to the administrator, and he was not afterward a party, if he was so before, and the plaintiff could testify as a witness in his own behalf.

RATIFICATION.—Liability as Surety.—Where the surety denied that he executed the bond, and there was evidence that he afterward assented to his name's remaining on the bond, the jury were authorized to find him liable on the bond for money received by his principal after such assent, and not paid over.

APPEAL from the Greene Common Pleas.

DOWNEY, J.—This was an action commenced in the name of the State, on relation of Walter A. Robinson and Rollin A. Blount, against James Eaton, administrator of the estate of William C. Piper, deceased, Lawson Oliphant, and John T. Hall, the appellant, before a justice of the peace, on the official bond executed by said Piper, with Oliphant and Hall as his sureties, for the proper discharge of his duties as justice of the peace. The breach of the bond alleged is, that Piper had collected and received money of the relators, due on certain judgments on his docket, which he had failed and refused to pay over to them on demand. Hall filed a verified answer before the justice of the peace, denying the execution of the bond by him. Oliphant filed no answer. Eaton, the administrator, was not found. Upon a trial before the justice of the peace, there was a finding and judgment for the plaintiffs against both Oliphant and Hall. Hall alone appealed to the common pleas, where there was a trial by jury, verdict for the plaintiff, motion for a new trial by the defendant overruled, and final judgment rendered for the plaintiff. From this judgment Hall appealed to this court, and has here assigned as errors, the insufficiency of the complaint, and the refusal to grant him a new trial.

The objection urged to the complaint is, that no copy of the bond was filed with it. This objection is obviated by an

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addition to the transcript certified up by the clerk of the common pleas since the error was assigned, showing that a copy of the bond was filed.

The reasons for a new trial are, first, that the verdict is not sustained by sufficient evidence; second, it is contrary to law; and third, for error of law occurring at the trial, and excepted to by the defendant.

One question made and discussed under this head is that relating to the admission of the testimony of Robinson, one of the relators, to prove that he demanded of Piper the payment of the money in his lifetime, and before the commencement of the action. It is objected by counsel for the appellant, that Robinson was not a competent witness, because the administrator of Piper was a party to the action. The statute provides, "that in all suits where an executor, administrator, or guardian is a party in a case where a judgment may be rendered either for or against the estate represented by such executor, administrator, or guardian, neither party shall be allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause," etc.

When the process was returned not found as to the administrator, and no steps were taken to have the cause continued as to him for further process, and the plaintiff proceeded to trial as to the other defendants, the suit abated as to the administrator, and he was not afterward, if he was before, a party to the action. *Kittering v. Norville, ante,* p. 183, and cases there cited.

No judgment in the action could have been rendered, either for or against the estate represented by him. We think, therefore, that the testimony of the witness was properly received.

Upon the question as to the sufficiency of the evidence, it is earnestly contended by counsel for the appellant that the judgment should be reversed. The facts are peculiar. Hall could write, and was accustomed to sign his own name, and yet the signature to the bond was not in his handwriting, but was in the handwriting of one Jamison. Jamison testi-

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fied that the signature was in his handwriting; that he had no recollection that Hall ever gave him any authority to sign the bond, nor of any circumstance connected with the signing of it; that Hall can write a tolerably good hand, and that he never knew him to execute any instrument unless he signed his own name. Hall himself testifies that he could write; that he never signed the bond, nor did he ever authorize any one else to do so; and that he did not know that his name was signed to the bond until during the winter of 1867.

Marsh King swore, that in March, 1868, Hall told him that he was Piper's security on his bond; that Piper's time as justice was nearly out, and he hoped it would all be right.

William Bridewell testified that there was a talk about Piper's being arrested for not paying over fines in the winter or spring of 1867; Hall went to see Piper, who was sick, and afterward informed him that he understood that his name was on Piper's bond, that he had learned that Piper would be sued for fines that he had collected and failed to pay over, that Piper had showed him a list of the fines, and told him that he had left one hundred and thirty-six dollars with the county auditor to pay the amount of the fines; that Hall said he was better satisfied, and witness understood that he was willing to remain on Piper's bond; that Hall said he had intended to get off the bond, but was willing to remain on, and hoped that all would come out right.

J. T. Oliphant testified that while Piper was sick, Hall came to his store, and he asked him if everything was all right; and he said that he had been to see Piper and was better satisfied, that he had told Piper that he was not on his bond, which ruffled Piper very much, but that he told Piper that he would stand on the bond if he fixed things up right.

J. T. Smith, clerk of the courts of Greene county, testified that he received a letter from Hall in the winter or spring of 1867, containing a request that he would have Hall's name taken off Piper's bond.

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Lawson Oliphant testified that some one had been to Bloomfield, and when he came back, reported that he and Hall were the sureties on Piper's bond; that Hall then said he had no recollection of signing his name to the bond; that he afterward heard Hall say that he had been to see Piper about the bond, and that Hall represented himself satisfied; that he said he had sent to Bloomfield and found out that his name was on the bond; that he was not willing to stand on the bond any longer; this was in the first conversation; afterward, when Hall had been to see Piper, he said Piper had satisfied him that there would be no trouble; that Hall said, on all occasions, that he intended to get off the Piper bond.

We are of the opinion that we cannot, without a violation of the rule which governs this court with reference to questions of fact, disturb the judgment on account of the insufficiency of the evidence to support the verdict of the jury.

The only other question is as to the correctness of the following charge by the judge to the jury, to which the defendant excepted:

"Fourth. The most difficult question that the jury will have to determine is, whether the bond sued on is or is not the bond of the defendant. Hall is not liable upon the bond, unless he signed the same, or authorized some person to sign it for him; or unless, after he ascertained his name was on the bond, he ratified the same; and he might ratify it by express words, or by acts that would imply his assent thereto."

The evidence shows that the judgment of the relators against Ryors was rendered by the justice of the peace on the 14th day of September, 1866, and that the justice received payments on the judgment as follows: January 7th, 1867, twenty dollars; September 26th, 1867, twelve dollars; October 2d, 1867, ten dollars and fifty cents; and that Piper paid over to the relators twenty dollars January 7th, 1867. The other judgment, the one against East, was rendered January 26th, 1867. On this, Piper received the full amount,

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twenty-seven dollars and fifteen cents, on the 27th day of June, 1867; of this amount, Piper had paid the relators ten dollars.

Hall swears that he knew in the winter of 1867, that is, as we understand, 1866 and 1867, that his name was on the bond as a security, and the evidence shows that to some of the witnesses he expressed himself satisfied, or better satisfied, and willing to remain on the bond. It was after this time, after or during the winter of 1867, that is, of 1866 and 1867, that all the money was received by Piper. By consenting to remain the security of Piper, and thus enabling him to continue to act as justice of the peace and receive the sums of money in question, we think the jury might have found that he ratified the act of Jamison in affixing his name to the bond, if it was signed by Jamison, whether he had originally authorized it or not, so far as this case is concerned.

Without deciding that the instruction in question is or is not exactly correct as a general proposition, we think that, in its application to the case made by the evidence, it is not erroneous.

The judgment is affirmed, with costs.

C. F. McNutt, G. W. Grubbs, W. A. Montgomery, A. G. Cavins, and — Shryer, for appellant.

F. D. Alexander, E. E. Rose, and E. H. C. Cavins, for appellee.

YANCY ET AL. v. TETER ET AL.

PLEADING.—*Substituted Complaint.*—The filing of a substituted complaint disposes of the original complaint.

DEFAULT.—*Motion to Set Aside.—Notice.*—Where a motion to set aside a default is made at the term when judgment has been rendered, notice of the motion is not required; if made at a subsequent term, notice should be given.

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SAME.—A motion to set aside a default must be supported by affidavit, and it must be shown that the party has a valid or meritorious defence, and the defence itself must be set out; and facts must be set out showing why an appearance was not made to the action before default, showing that the default was taken "through his mistake, inadvertence, surprise, or excusable neglect."

SAME.—Where a judgment has been taken by default, a motion to set aside the default, or proceedings for relief from the judgment, or to review it, must precede an appeal.

PLEADING.—*Demurrer.*—No error can be committed in overruling a demurrer to a reply to a bad answer.

INTEREST ON MONEY.—*Usury.*—One who has paid, or agreed to pay, interest at a higher rate than ten per centum per annum can only recoup or defend against the excess over ten per cent.

PLEADING.—*Answer.*—A paragraph of an answer which assumes to answer the whole complaint, or some entire item or particular portion thereof, while the facts pleaded only amount to an answer to a part, is bad.

CONTRACT.—*Indemnity.*—A., at the request of B., borrowed of C. a certain sum of money, and gave C. his note for the same. A., as previously agreed, then let B. have the money, and B. made his note to A. for the same.

Held, that A. did not hold the note of B. as an indemnity, and he could recover of B. on his note without having himself made payment to C.

APPEAL from the Marion Common Pleas.

BUSKIRK, C. J.—Boyed Teter and George Teter were the plaintiffs in the court below, and are the appellees here. The appellants were the defendants below. The original complaint was filed on the 3d day of August, 1870, and was against Joseph A. Yancy and James L. Yancy. The action was based upon a note alleged to have been executed by the defendants, payable to the appellees for the sum of one thousand one hundred and fifty dollars, and upon an alleged balance of fifty-five dollars due upon an account. A summons was issued on this complaint, and was served upon Joseph A. Yancy and returned not found as to James L. Yancy. On the 8th day of September, 1870, that being the fourth judicial day of said term of court, Joseph A. Yancy appeared and demurred to the complaint for an alleged insufficiency of facts. The appellees, on the 5th day of October, 1870, that being the twenty-seventh judicial day of the September term of said court, by the leave of the court, filed a substituted complaint against Joseph A. Yancy and John G.

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Yancy. The substituted complaint was based on the same note and account as described in the original complaint. Upon the filing of the substituted complaint, the court overruled the demurrer which had been filed to the original complaint, and the said Joseph A. Yancy excepted to such ruling.

Upon the filing of the substituted complaint, the appellees filed interrogatories, and Joseph A. Yancy was ruled to answer them on the next day. On the 8th day of October, 1870, that being the thirtieth judicial day of said term of court, Joseph A. Yancy was three times called, and, failing to answer, he was defaulted, and judgment was rendered against him for the full amount of the note, with interest, and for the balance due upon said account. The summons and return thereon are in the record, and show proper service as to Joseph A. Yancy.

The suggestion of not found was made as to John G. Yancy, and as to him the cause was continued for service of process.

It does not appear from the record that any summons was issued against John G. Yancy, after the substituted complaint was filed.

On the 9th day of November, 1870, that being the third judicial day of the November term, 1870, of said court, John G. Yancy appeared and filed an answer in two paragraphs.

On the fourth judicial day of said term, the appellant John G. Yancy was ruled to answer on the 12th day of November the interrogatories filed by the plaintiffs. On the fourth judicial day of said term, John G. Yancy filed interrogatories, and the appellees were ruled to answer them on the 12th day of November, 1870.

On the 16th day of November, 1870, John G. Yancy filed his answer to the interrogatories filed by the plaintiffs.

On the 23d day of November, 1870, that being the fifteenth judicial day of said term, the plaintiff filed a reply to the second paragraph of the answer of John G. Yancy. Thereupon the appellant John G. Yancy demurred to the reply,

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on the ground that it did not contain facts sufficient. The court overruled the demurrer, and the appellant John G. Yancy excepted.

By the agreement of the parties, the issues formed between the appellees and appellant John G. Yancy were submitted to the court for trial, and resulted in a finding that said John G. Yancy was indebted to the appellees on the note sued on, in the sum of one thousand two hundred and seventy dollars.

The record then contains the following entry:

"Come now the defendants by Hanna & Knefler, their attorneys, and move the court to set aside the default heretofore taken in this cause against the defendant Joseph A. Yancy; and also move the court for a new trial, as to both of said defendants, for the following reasons, to wit:

"First. That the court erred in overruling the defendants' demurrer to the complaint.

"Second. The court erred in striking out the defendant Joseph A. Yancy's answer to the complaint, on the grounds of failure to answer certain interrogatories propounded to them, rule being to enforce said answer by attachment.

"Third. The court erred in striking out the defendant Joseph A. Yancy's answer, and ordering a judgment against him as on default.

"Fourth. Error of the court in overruling the demurrer of the defendant John G. Yancy to the reply filed by the plaintiffs to the second paragraph of the said Yancy's answer.

"Fifth. That the judgment of the court, as to the defendant John G. Yancy, is not sustained by the evidence.

"Sixth. That the finding and judgment of the court, as to the defendant John G. Yancy, is contrary to the evidence.

"Seventh. Error of law occurring on the trial of said cause.

"Eighth. That the damages assessed are excessive, and not sustained or supported by the evidence.

"Ninth. That the original complaint filed herein was

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against Joseph A. Yancy and James L. Yancy, upon which process was taken out and served, and judgment awarded against the defendant Joseph A. Yancy; that the substituted complaint filed is against Joseph A. and John G. Yancy, being different parties, and, therefore, the court erred in permitting the same to be filed as a substituted complaint, and erred in the rendition of a judgment thereon.

“HANNA & KNEFLER,
“Attorneys for Defendants.”

Which motion the court overrules; said defendants except to such ruling; and, on motion, thirty days time is allowed in which to file a bill of exceptions.

Within the time limited, a bill of exceptions was filed, embodying the evidence given upon the trial of the issues between the appellees and John G. Yancy, but no bill was filed in reference to the motion of Joseph A. Yancy to set aside the default. The court rendered judgment against John G. Yancy upon its finding against him.

Both of the defendants have appealed, and assigned the following errors:

“First. The court erred in overruling Joseph A. Yancy’s demurrer to the original complaint.

“Second. The court erred in refusing to set aside the default and judgment rendered against Joseph A. Yancy.

“Third. The court erred in overruling the demurrer of John G. Yancy to plaintiffs’ reply to the second paragraph of his answer.

“Fourth. The judgment of the court, as to the defendant John G. Yancy, is not sustained by the evidence.

“Fifth. That the finding and judgment of the court, as to the defendant Joseph A. Yancy, is contrary to the evidence.

“Sixth. That the damages assessed against the said Joseph A. Yancy are erroneous and excessive, and not supported by the evidence.

“Seventh. That the court erred in the rendition of any judgment whatever against the said Joseph A. Yancy on the original complaint filed.

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"Eighth. The court erred in overruling appellants' motion and reasons for a new trial of this cause."

We will first determine whether there appears of record any error, of which the appellant Joseph A. Yancy can complain. The first three reasons assigned for a new trial were intended to apply to Joseph A. Yancy. The first is not a valid reason for a new trial, but should be assigned for error.

The second and third have no foundation in fact. The record does not show that any answer was filed by Joseph A. Yancy, or that any such answer was stricken out. Nothing of the kind was shown, either in the minutes of the court or in a bill of exceptions. It results that there was no valid reason for a new trial shown by the appellant Joseph A. Yancy.

The first, second, fifth, sixth, and seventh assignments of error relate to Joseph A. Yancy.

The first assignment is, that the court erred in overruling the demurrer to the original complaint. The demurrer was filed to the original complaint, but before the court made any ruling thereon, the plaintiffs, by the leave of the court, filed a substituted complaint. The filing of the substituted complaint disposed of the original complaint. The original complaint had been substituted by the new complaint, and no longer constituted a paper in the cause. The action of the court, in overruling the demurrer thereto, was a nullity, and worked no injury to the appellants, and no error can be assigned on such ruling. There was no objection made to the filing of the substituted complaint, nor was there any motion made to strike it out, nor was a demurrer filed thereto, but the appellant appeared thereto without objection.

The second assignment of error is based upon the refusal of the court to set aside the default. This assignment assumes that a proper application was made. In our opinion, this assumption is unfounded. The default was entered at the September term. The motion was made at the next term. There was no notice given of the motion. When the motion is made at the term when judgment is rendered,

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no notice is required; but when made at a subsequent term, there should be notice. 3 Ind. Stat. 375.

There was no proper application made to set aside the default. At the November term, there was coupled with the motion for a new trial a motion to set aside the default, but there was no excuse shown why the said Joseph A. Yancy did not appear to the action at the time when the default was taken, nor was it shown that he had any valid or meritorious defence to the action. The motion was not supported by affidavit. To entitle a party to have a default set aside, it must appear that it was taken "through his mistake, inadvertence, surprise, or excusable neglect." There was no excuse shown.

It must also appear that the party has a valid and a meritorious defence. It is not enough to say that the party has a valid defence, but the defence itself must be set out, so that the court may see that it is a valid defence. *Goldsberry v. Carter*, 28 Ind. 59; *Phelps v. Osgood*, 34 Ind. 150.

Where a judgment has been taken by default, a motion to set aside the default, or proceedings for relief from the judgment, or to review it, must precede an appeal to this court. *Blair v. Davis*, 9 Ind. 236; *Harlan v. Edwards*, 13 Ind. 430; *Gray v. Dickey*, 20 Ind. 96; *Skeen v. Huntington*, 25 Ind. 510.

There having been no proper application in the court below to set aside the default, we cannot consider the fifth, sixth, and seventh assignments of error. Besides, there was no foundation made in the motion for a new trial for the fifth and sixth assignments of error. The seventh assignment is not supported by the record. The judgment was rendered on the substituted, and not on the original, complaint.

We are next to inquire whether there were any erroneous rulings against the appellant John G. Yancy. The first error that is assigned by him is based upon the action of the court in overruling the demurrer to the reply to the second paragraph of the answer. To render our ruling intelligible, it will be necessary to set out the second paragraph of the

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answer and the reply thereto. The answer reads as follows:

"Second. And said defendant, for further answer to plaintiffs' complaint says, that at the time of the execution of the said note sued on, his co-defendant, Joseph A. Yancy, borrowed of plaintiffs the sum of one thousand dollars, and no more; that interest on said note was calculated at the rate of fifteen per cent. for one year; that said interest at said rate was added to the principal, and then a note executed for eleven hundred and fifty dollars, it being the same note sued on; and defendant says that, as to said sum of one hundred and fifty dollars, the only and sole consideration therefor is interest at the rate of fifteen per cent., which amount of interest is usurious and illegal; that, as to said usurious and illegal interest, there is no consideration therefor, and that said note, as to said sum, is without legal consideration. Wherefore, as to said sum of one hundred and fifty dollars, the defendant prays that the same abate and be deducted from said note sued on. Wherefore, said defendant, as to the matters herein pleaded, prays judgment.

"HANNA & KNEFLER,

"Attorneys for defendant."

The reply thereto was in these words:

"Come now the plaintiffs, Boyed Teter and George Teter, by their attorneys, and for a reply to the second paragraph of defendant John Yancy's answer, say, first, that the consideration of said notes was not for money loaned, as in said answer stated, but that the consideration of said notes was as follows: The said defendant and one Joseph A. Yancy were desirous of borrowing money in Hamilton county, Indiana, where the plaintiffs reside, and had no credit in the said neighborhood of plaintiffs, except with plaintiffs; that the plaintiffs had no money to loan, but were themselves borrowers; but there was residing in said neighborhood one Lewis Underwood who had money to loan, but would not loan it to the said Yancys, and the said Yancys requested the plaintiffs to borrow the sum of one thousand dollars of the said Underwood for them, and give their note to the

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said Underwood for the sum of eleven hundred and fifty dollars, payable one year after date, and that they, the said Yancys, would give their note to the plaintiffs for the like sum, to secure them for the payment of the said note made by them to the said Underwood; and plaintiffs allege that they did give their note to the said Underwood for the said sum of eleven hundred and fifty dollars, payable one year after the date thereof, and did receive from the said Underwood one thousand dollars, which identical money they carried to the defendants, Yancys, and gave the same to them, taking from them the note sued on in this case, pursuant to the agreement aforesaid. Wherefore, the plaintiffs say that the consideration of the note sued on was for borrowing the said money from the said Underwood for the said defendants, and giving their note to the said Underwood, and becoming responsible to the said Underwood therefor, and for no other consideration whatever.

"And plaintiffs further aver that there was no agreement between the plaintiffs and defendants for the payment of any interest whatever; that the plaintiffs received no interest whatever from the defendants, nor was there any received for their benefit in the transaction; that the whole transaction was made at the request of the defendants and for their accommodation and benefit; wherefore the plaintiffs demand judgment.

Voss & DAVIS,

"Attorneys for plaintiffs."

The substance of the answer was, that as to one hundred and fifty dollars of the note, there was no valid consideration, because such sum was for interest reserved at the rate of fifteen per cent. per annum.

The reply denied that any part of the consideration of the note was for interest, but averred that as to one hundred and fifty dollars of the note, the consideration was for the services of the plaintiffs in negotiating the loan with Underwood, and for becoming personally responsible for said sum of money.

If any part of the consideration of the note was for usuri-

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ous interest, such consideration was illegal. But it was a question of fact, to be determined on the trial, what was the real consideration of the note. We think the reply presented such an issue. But, however this may be, we are very clearly of the opinion that the court committed no error in overruling the demurrer to the reply, for the reason that the answer was bad.

The facts stated in the answer were pleaded in bar of one hundred and fifty dollars of the note sued on, and not to so much as might be usurious. It is provided by the first section of "an act concerning interest on money, and to provide for recoupmont of usurious interest," approved March 9th, 1867, "that interest upon the loan or forbearance of money, goods or things in action, shall be at the rate of six dollars a year upon one hundred dollars, and no greater rate of interest shall be taken, directly or indirectly, unless the agreement to pay a higher rate of interest be made in writing, and signed by the party to be charged; but such rate of interest shall in no case exceed the rate of ten dollars a year on one hundred dollars; but it may be taken yearly, or for any shorter period, in advance." 3 Ind. Stat. 317.

By the above section, two legal rates of interest are fixed. Six per cent. per annum upon one hundred dollars is the legal rate, in the absence of an agreement in writing, signed by the party to be charged, to pay a higher rate of interest, and no greater rate than six per cent. can be received without such agreement. But it is further provided by said section, that persons may, by such an agreement, fix the rate of interest at any rate not exceeding ten per cent., but such rate of interest shall in no case exceed the rate of ten per cent.

It is further provided by the second section of said act, that "all interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal, as to the excess only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant when-

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ever it has been reserved or paid before the bringing of the suit; provided, that nothing herein contained shall affect the loan of public funds, nor interest on purchase-money of canal, college, school or saline funds." 3 Ind. Stat. 318.

It is provided by the above section, that one who has paid or agreed to pay interest at a higher rate than ten per centum per annum can only recoup or defend against the excess over ten per cent. It is alleged in the answer that interest was reserved at the rate of fifteen per cent., and that the amount so reserved was added to the sum borrowed, and a note was taken for both sums. Ten per cent. of the interest so reserved was legal; and in an action upon such instrument, the excess only, over the rate of ten per cent., could be recouped. The answer was pleaded in bar of one hundred and fifty dollars, when the facts stated therein showed that it was only a bar to fifty dollars.

A paragraph of an answer which assumes to answer the whole complaint, or some item or particular part thereof, while the facts pleaded only amount to an answer to a part, is bad. *Engler v. Davis*, 18 Ind. 296; *Free v. Haworth*, 19 Ind. 404; *Feaster v. Woodfill*, 23 Ind. 493; *Sayres v. Linkhart*, 25 Ind. 145; *Traster v. Snelson's Adm'r*, 29 Ind. 96; *Stone v. Lewman*, 28 Ind. 97; *The New Eel River Draining Association v. Durbin*, 30 Ind. 173.

It is next maintained by the appellants, that the note sued on was a mere indemnity, and that the plaintiffs could not maintain an action on the note sued on, until they had paid to Underwood the money by them borrowed of him.

We are of the opinion that the above position is wholly untenable. The appellants never borrowed any money of Underwood, and were in no sense liable to him. Underwood never had any right of action against the appellants. He loaned the money to the appellees, and took their note, payable to himself, and they loaned the money thus procured to the appellants, and took their note, payable to themselves. The appellants are not at all interested in the question

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of whether the indebtedness of the appellees to Underwood is ever discharged.

It is next maintained by the appellants, that the finding of the court is not supported by, but is contrary to, the evidence. We have examined the evidence, and are of a different opinion. Besides, the evidence is so conflicting as to prevent us, under the well established practice of this court, from interfering with the finding of the court.

The judgment is affirmed, with costs.

J. Hanna and F. Knefler, for appellants.

G. H. Voss, for appellees.

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PROMISSORY NOTE.—Jurisdiction.—The makers of a promissory note, payable at a bank in this State, to a complaint against the makers and indorser, answered, that they were the parties immediately liable to judgment and execution, and that they resided out of the county in which the suit was brought. *Held*, on motion by the plaintiff for judgment on the pleadings, that the answer was bad, as the indorser, as well as the makers, was immediately liable to the holder.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The appellee as indorsee sued John Hall, Benjamin Hall, and Eli Carey, the makers, and the Eagle Machine Works, the payee and indorser of two promissory notes, made payable at the Citizens' National Bank of Indianapolis. The Eagle Machine Works made default. The makers of the notes pleaded to the jurisdiction of the court, that the action was brought by the assignee of a claim arising out of contract assigned to the plaintiff by the defendant, the Eagle Machine Works; that said action was founded on said claim so assigned; that John Hall and Eli Carey resided in the

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county of Hamilton, Indiana, and had resided there for more than two years last past continuously; that the said Benjamin Hall resided in Madison county, in said State, and had for many years last past; and that they were the parties immediately liable to judgment and execution in said cause. The plaintiff thereupon filed a reply, in which he admitted the truth of the answer, and moved the court to render judgment in his favor on the pleadings; which motion the court sustained, and rendered judgment accordingly for the plaintiff against all the defendants.

The appeal and assignment of errors are by the makers of the note alone, and it is alleged by them that the court erred in sustaining the motion for judgment on the pleadings, because the court had no jurisdiction of the subject-matter, or of the persons of said appellants.

As the appeal and assignment of errors are by only a part of the defendants, they are irregular, and the appeal should be dismissed, were it not for the fact that the irregularity is expressly waived by the appellee, and the further fact that there is evidently no merit in the appeal, and the appellants should not thus escape the penalty which should attach to them for their false clamor.

The defendants are all severally and immediately liable to the plaintiff, and for the appellants to allege that they are the parties immediately liable to judgment and execution, and that they resided out of the county where the action was brought, does not show a want of jurisdiction in the court. It is not alleged that the Eagle Machine Works is not also immediately liable to judgment and execution, as well as the defendants. If that allegation was in the pleading, it would be but a mere denial of a legal proposition; for every lawyer knows that upon a bill of exchange, or upon a promissory note made payable at a bank in this State, all the parties thereto may be sued in the same action, and that they are all severally and immediately liable to the holder. 2 G. & H. 50, sec. 20; *Marshall v. Pyeatt*, 13 Ind. 255; 1 G. & H. 451, sec. 16. Why it was supposed that the court had

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no jurisdiction of the subject-matter, we are not informed, and cannot imagine.

The judgment is affirmed, with ten per cent. damages against the appellants and costs.

D. Moss, F. M. Trissal, and W. Wallace, for appellants.

J. T. Dye and A. C. Harris, for appellee.

FREE *v.* MEIKEL.

CONTRACT.—Rescission.—An agreement indorsed upon a deed for an interest in a patent right, that “all writings and papers heretofore executed between the undersigned concerning and touching the within patent right, are rescinded and annulled,” was construed to include deeds of conveyance of lands, given in consideration of deeds for interests in the patent previously executed, and to annul such conveyances of land.

MISTAKE.—Evidence.—Intention.—A mistake in a writing may be alleged, proved, and corrected, but a party cannot, without such allegation, prove the mere intention of the parties, or one of them, in opposition to the plain meaning of the writing.

APPEAL from the Hendricks Circuit Court.

DOWNNEY, J.—This action was brought by the appellee against the appellant, and resulted in a judgment in favor of the appellee. There is but a single question presented to us by the assignment of errors, and that is as to the correctness of the ruling of the court in sustaining the demurrer of the plaintiff to the answer of the appellant. To comprehend the question involved, it will be necessary to know what is in the complaint, as well as what the answer contains.

The complaint alleges; that in 1867, Meikel was the owner of certain real estate in the city of Indianapolis, and that the plaintiff entered into a contract with the defendant touching or concerning a certain patent right or invention,

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by which the defendant agreed to assign to the plaintiff an undivided one-eighth interest in the same for the whole territory of the United States, except the State of Indiana and a few other unimportant reservations set forth in the assignment, and in consideration thereof the plaintiff agreed to convey to the defendant the said real estate; that the plaintiff did convey to the defendant the said real estate, and the defendant made the assignment of the patent right; that afterward, in consideration of the assignment to him of the right and title to said patent right in the undivided one-half of forty-one of the poorer and less valuable counties of the State of Indiana, at the request of the defendant, the parties made and executed an agreement, indorsed on a copy of the assignment of said patent, as follows:

"This certifies that the within and foregoing is a full, true, and complete duplicate and copy of a deed of assignment this day executed by John W. Free to the undersigned, and of which original deed of assignment this is declared to be a part. The cash value of the consideration this day paid, or to be paid, by said John M. Meikel to said John W. Free, is not three thousand six hundred dollars, as stated in the assignment, but is as follows: by consent of the undersigned, all writings and papers heretofore executed between the undersigned concerning and touching the within patent right are rescinded and annulled, and said Meikel hereby releases said Free from all claims and demands to this date, inclusive, touching said patent right; and the said John W. Free hereby releases the said Meikel from all claims of every nature to this date, inclusive. Said Free also delivers to said Meikel four promissory notes dated May 25th, 1867, executed by Fred. Meikel to John W. Free, or bearer, for one hundred and fifty dollars, each payable three, six, nine, and twelve months after date, respectively; said notes are now the property of said Meikel and one A. W. Kendrick, share and share alike. This is intended as a full and complete settlement of all claims between the undersigned to this date,

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inclusive. Witness our hands and seals this 7th day of June, 1867.

"[Attest:]
"JOSEPH FREE,
"C. J. THOMPSON."

JOHN W. MEIKEL, [Seal.]
JOHN W. FREE. [Seal.]

Wherefore, the plaintiff claimed that the previous contract was rescinded, and the plaintiff and defendant placed in their former condition; the deed of assignment from the defendant to the plaintiff of an undivided one-eighth interest in said patent for the whole United States, above referred to, was annulled and rescinded, and the deeds of conveyance from said plaintiff to the defendant for said real estate were also annulled and rescinded, and the defendant had no longer any interest in said land. Yet the plaintiff says the defendant refuses to deliver up possession of the said land to the plaintiff, and claims the same as his own, and collects the rents accruing from the same, and refuses to reconvey the same to the plaintiff. Wherefore, the plaintiff prays for a decree of this court quieting his title, and decreeing that said property be reconveyed to this plaintiff, and for all proper relief.

The answer in question says that the plaintiff and defendant, on the 25th day of April, 1867, made and entered into a contract. This contract is an assignment of the undivided half of said patent right in the States of Wisconsin and Minnesota, excepting one county in Minnesota, for the expressed consideration of ten thousand dollars, on the back of which was a memorandum stating that the consideration was not ten thousand dollars, but was certain real estate described in said memorandum; that on the 27th day of April, 1867, two days afterward, the parties made and entered into another contract. By this contract, the defendant assigned to the plaintiff said patent in an undivided one-half of the entire State of Minnesota, excepting the county of Hennepin, for the alleged price of four thousand five hundred dollars. On this conveyance was also indorsed a statement that the consideration thereof was not the amount stated, but was certain other real estate; that on the 29th day of

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April, 1867, the parties entered into another contract, by which the defendant conveyed to the plaintiff an undivided one-fourth of said patent in the State of Indiana, excepting certain specified counties, also one-half of the State of Wisconsin, for the expressed consideration of eight thousand dollars. On the back of this is also an indorsement stating that the true consideration was an undivided half of certain personal property, consisting of a house and certain promissory notes, which had been received by Meikel for territory sold by him under the preceding contracts, in lieu of the territory so sold by him, which he could not reassign, said Meikel retaining for his own use a share of the proceeds of such sales, amounting to one thousand dollars; that in addition to the above property, Meikel paid for the territory last named, and the undivided three-eighths of the State of Minnesota, excepting the county of Hennepin, four houses and lots in J. Mart and Charles P. Meikel's subdivision of the north half of out-lot 164, in Indianapolis, also two vacant lots in Bradshaw & Holmes' subdivision to said city; that on the 7th day of June, 1867, the plaintiff and defendant and one A. W. Kendrick made and entered into a fourth contract. This is an assignment of the patent for an undivided half of the State of Indiana, excepting certain counties, for the expressed consideration of three thousand and six hundred dollars. Upon this assignment is indorsed the agreement of rescission set out in the complaint. It is then alleged in the answer that this last agreement was intended to be and was a complete settlement between the parties of all claims and demands in action between them to that date, and that all former assignments and agreements to assign any interest in said patent right were thereby cancelled, annulled, and settled; that all notes and claims of every kind, intended to be settled by said agreement and release, were then and there given up; that the intentions of the parties and terms of said agreement did not extend to any conveyances of real estate theretofore made by the plaintiff to the

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defendant, and such terms were used as would not only not include, but expressly exclude all real estate conveyed, and the conveyances of land theretofore made by plaintiff to defendant were retained by defendant, and continued in force by the parties as so much toward the consideration of the last assignment and agreement; that all of said contracts and agreements were made with the full knowledge of the plaintiff, and in each of them, from first to last, it was expressly understood and agreed by and between the parties, and especially by the plaintiff, that he, the said plaintiff, trusted and relied upon his own judgment, and not upon any representation of this defendant or his agent or agents; and he says that the interest mentioned in these contracts is the same interest in the patent right and the same real estate mentioned in the complaint.

The question involved depends upon the construction to be given to the memorandum indorsed upon the conveyance or assignment of the 7th day of June, 1867, and set out in the complaint. It was stipulated in that writing, that "all writings and papers heretofore" (theretofore) "executed between the undersigned, concerning and touching the within patent right, are rescinded and annulled," etc. We think that this language must be held to include the conveyances in question for the land, as well as those for the patent right. It could hardly be reasonably concluded that the deeds for the patent right were intended to be rescinded, and not the deeds for the land also, which were the consideration therefor. The deed for the patent right, made as the consideration for the conveyance of the land, was for one-eighth of the whole United States, except the State of Indiana; whereas the deed made at the time of the rescission in question was only for part of the State of Indiana. It could hardly have been intended that the defendant should have the land for the deed for part of the State of Indiana, which was treated as a sufficient consideration for one-eighth of the territory of the United States excepting the State of Indiana.

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The allegation in the answer, "that the intention of the parties and terms of said agreement did not extend to any conveyances of real estate theretofore made by the plaintiff to the defendant," etc., is inadmissible. If there was any mistake in the writing by which it was made contrary to the intention and agreement of the parties, it might have been alleged, proved, and corrected; but there is no rule of law or practice which allows a party to set up and prove the mere intention of the parties to a written contract, or one of them, in opposition to its plain meaning and import. *Patterson v. Doe*, 8 Blackf. 237. And such mistakes may be corrected in an action brought for that purpose, or in any other action, when such correction would be essential to a complete remedy. 2 G. & H. 98, sec. 71.

There crops out in this case some of the evidence of the obliquity prevailing in much of the dealing in this kind of property. Why should one consideration be expressed on the face of the deed of assignment of the patent right, and a contradictory statement be endorsed upon the back of it? Why such unusual and so many recitals in the deeds, with a view to estopping the grantee from asserting a defence? We see no reason to believe that we could arrive any more nearly at the justice of the matter between the parties than has been done by the circuit court.

The judgment is affirmed, with costs.

L. Barbour and *C. P. Jacobs*, for appellant.

J. T. Dye and *A. C. Harris*, for appellee.

GALLIMORE *v.* AMMERMAN ET AL.

PLEADING.—*False Imprisonment.*—A complaint for arrest and false imprisonment need not aver that the acts complained of were done illegally, or wrongfully, or without competent authority.

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146	92
39	323
159	288

SAME.—*Answer.*—An answer which attempts to justify the arrest and imprisonment must identify the trespass justified with that complained of, or it will be bad on demurrer.

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APPEAL from the Warren Common Pleas.

WORDEN, J.—Complaint by the appellant against the appellees, as follows:

"The plaintiff complains of the defendant, and says that, on or about the —— day of March, 1871, the above named defendants, at the town of West Lebanon, assaulted the plaintiff, and with force compelled him to go from the street in said town, where he then was in the pursuit of his interest and pleasure, to a small shanty, so built with coarse boards as to be as cold and comfortless as out door in the open air; and the defendants then and there imprisoned him, said plaintiff, and kept and detained him as a prisoner therein for the space of seventeen hours, contrary to the law of this State and against the will of the said plaintiff, by means of which he suffered great agony of body on account of cold and hunger, by means of which his health was greatly impaired, so that he was compelled to lose his time, not only during said false imprisonment, but ever since, on account of said exposure and imprisonment, and he was greatly injured in his name and credit. And he further avers that, during such false imprisonment, said defendants refused to allow him any food and nourishment whatever, and that the weather was very cold. And the plaintiff says that he is damaged, by means of the foregoing facts, in the sum of five thousand dollars; wherefore," etc.

"2. And for a further complaint, plaintiff says that the defendants, jointly acting, the said Miller as a justice of the peace within the town of West Lebanon, and the said Ammerman, acting as the marshal of said town, claiming to act by virtue of authority conferred on them by the corporate authorities of said town, arrested the plaintiff therein on the —— day of March, 1871, and compelled him to go from the streets of said town, where he was in the pursuit of his pleasure and interest, to a small shanty built of coarse boards, so that it was as cold and comfortless as out in the open air, and then and there imprisoned the said plaintiff, without food or fire, for the space of seventeen hours, with-

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out giving him a trial of the pretended charge for which they claim to have arrested him; and he avers that his trial was thus delayed, and he was thus detained, for no cause whatever, except the malice of the defendants. The charge upon which he was arrested was a violation of some pretended ordinance of said town, and no reasonable cause existed why he should not have been tried at once, without detaining him seventeen hours before trial. And he avers that, at the time of such arrest, to wit, about five o'clock, P. M., he had had nothing to eat since morning, at breakfast time; and they kept him thus confined, without anything to eat or nourishment, for the space of seventeen hours thereafter, and wilfully refused to furnish him with any food or fire, or anything to keep him warm; and he says the weather was very cold at the time. He avers, by means of such exposure and harsh treatment, his health was so impaired that he has been sick ever since, and suffered great pain of body and mind; by means of which he is damaged in the sum of five thousand dollars, for which he demands judgment," etc.

A demurrer was filed to the complaint, which was sustained to the first paragraph, the plaintiff excepting, and overruled as to the second.

The defendants answered the second paragraph, first, by general denial, and second, "that defendant John Ammerman was marshal of the town of West Lebanon, in Warren county, Indiana, on the 17th day of March, 1871; that on said last mentioned date, defendant John Miller was an acting justice of the peace, duly commissioned and qualified, in and for said town of West Lebanon; that on said 17th day of March, said West Lebanon was an incorporated town under the law of the State of Indiana in that behalf; that on said 17th day of March, an ordinance of said town of West Lebanon was in force, a copy of which is herewith filed, marked 'A,' and made a part of this paragraph of answer; that on said 17th day of March, plaintiff came to said town of West Lebanon and became highly intoxicated, and went

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about the public streets and public places in said town while in that state, and then and there disturbed the peace and quiet of said town by making loud and unusual noise, and by using profane and indecent language therein, in violation of said ordinance; that thereupon, on said 17th day of March, defendant Ammerman, by virtue of his authority as marshal of said town, and seeing said plaintiff drunk as aforesaid, and disturbing the peace as aforesaid, arrested said plaintiff, and he, said plaintiff, being too drunk to be tried or plead to any charge of violation of said ordinance, placed him in the town prison, the same being a light, comfortable, plank house, and placed hay, blankets, and quilts in said prison for plaintiff to sleep on; that on the next morning, to wit, on the 18th of March, plaintiff was taken by said marshal before defendant John Miller, and having been arraigned before said Miller on a charge of drunkenness, disturbing the peace, and using profane language, in violation of the provision of said ordinance, for plea said he was guilty as charged; whereupon the defendant Miller fined the plaintiff five dollars and costs for his violation of said ordinance, which fine and costs plaintiff paid."

Accompanying the paragraph is the ordinance pleaded.

The plaintiff demurred to this paragraph of the answer, for want of sufficient facts; but the demurrer was overruled, and he excepted; and declining to reply, judgment was rendered against him.

The questions presented here involve the correctness of the rulings in sustaining the demurrer to the first paragraph of the complaint and overruling that to the second paragraph of the answer.

We are not favored with any brief on behalf of the appellants, and, therefore, are not advised what objection is supposed to exist to the first paragraph of the complaint, or upon what ground the demurrer thereto was sustained.

That paragraph charges that the defendants assaulted the plaintiff, and by force compelled him to go from the place where he was, to a shanty, where they imprisoned him, and

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detained him as a prisoner therein for the space of seventeen hours, against his will. No objection occurs to us, unless it be that the paragraph does not aver that the acts of the defendants were done illegally, or wrongfully, or without any competent authority. But in our opinion no such allegation was necessary. As a general rule, a party is not required to allege more than he is bound to prove, in order to entitle himself to recover. The facts alleged, on being proved, would entitle the plaintiff, *prima facie*, to recover; and absolutely, unless it should be shown that the acts were rendered rightful and legal by some competent excuse or authority. Such excuse or authority must come from the defendant. "Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful." 1 Chit. Pl. 501.

The paragraph is evidently drawn from a precedent for a declaration for false imprisonment, found in 2 Chit. Pl. 857, which contains no allegation that the acts were either wrongful, illegal, or without authority.

We are of opinion that the paragraph was good, and that the demurrer thereto was erroneously sustained. *Colter v. Lower*, 35 Ind. 285.

We come to the second paragraph of the answer, pleaded to the second paragraph of the complaint. It is objected by the appellant, that no valid ordinance is set out, but no objection to the validity of the one pleaded is pointed out, and we see none. It is further objected, that the pleading in no manner identifies the trespass justified with that complained of. The precedents for pleas justifying arrests under authority contain the averment that the trespasses justified "are the supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant." 3 Chit. Pl. 1081. This, or some equivalent allegation, seems to be essential.

In the paragraph under consideration, there is nothing to show that the arrest and imprisonment of the plaintiff which are justified, or attempted to be justified, are the same arrest

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and imprisonment of which the plaintiff complained. This objection is fatal to the validity of the paragraph. Some other objections are made to the paragraph, which need not be noticed, as one fatal defect renders the paragraph as bad as if there were many.

The demurrer to the paragraph in question should have been sustained.

The judgment is reversed, with costs, and the cause remanded, with instructions to proceed in accordance with this opinion.

F. McCabe, for appellant.

M. Milford and *L. T. Miller*, for appellees.

BARNES ET AL. v. BELL ET AL.

PRACTICE.—*Appeal.—Error.*—Where a complaint is sufficient, and judgment thereon has been taken on default, the question whether the judgment has been taken for too large a sum cannot be presented on appeal for the first time. SAME.—*Amendment After Verdict.*—Where a promissory note includes the payment also of “all necessary expenses of collection,” although there be no averment in a complaint on such note of what such expenses are, still, after verdict the amendment will be regarded as having been made, and the judgment will not be reversed for want of such averment.

APPEAL from the Grant Common Pleas.

DOWNEY, J.—The judgment in this case was for the appellees, the plaintiffs below, by default of the defendants, the appellants, on a promissory note, made by the defendants, by which they agreed to pay a specified amount of money, and “all necessary expenses of collection.” Without any proceeding to set aside the default, or for relief against the judgment in the common pleas, the defendants have appealed to this court, and have assigned the following errors:

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First. The complaint in said cause is insufficient to recover more than the note and interest.

Second. The judgment and finding in said cause are for a much larger sum than is due on the note in the complaint.

Third. Said judgment is for more than was authorized.

Fourth. The process in said cause is not made a part of the record.

The first, second, and third errors amount to the same thing; that is, that the judgment is too large. This might have been a good cause for setting aside the inquest of damages, but it is not a matter that can be assigned for error in such a case as this. Had the complaint not stated facts sufficient to constitute a cause of action, the appellant might have assigned that as error, without first making a motion, or taking any other steps to be relieved from the judgment in the court below. *Strader v. Manville*, 33 Ind. 111.

But here the complaint was sufficient; but the point made is, that the amount of the judgment is too large. The objection is not well taken for the first time in this court. *Skeen v. Huntington*, 25 Ind. 510, and cases there cited.

The fourth assignment of error, which is, that the process is not set out in the record, is not true. The summons and return are in the record, and service was in time. The note on which the suit was brought provided, as we have seen, that the defendants should pay all necessary expenses of collection. The complaint, although it sets out the note, does not allege what were or would be the expenses of collection. It appears, by calculation, that an amount was allowed over and above the amount due on the note for principal and interest, which, we presume, was allowed for the expenses of collection, the attorney's fee. It was proper to include this amount in the judgment, if it had been alleged in the complaint. But the court might have allowed an amendment of the complaint in this respect; and we may treat it as made, and will not, under the circumstances, reverse the judgment. 2 G. & H. 278, sec. 580, and 118, sec. 99.

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The judgment is affirmed, with five per cent. damages and costs.

J. Brownlee and H. Brownlee, for appellants.

A. Steele and R. T. St. John, for appellees.

89	330
126	320
127	513
39	330
167	159

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ARBITRATION.—Justice of the Peace.—Jurisdiction.—A submission to arbitration cannot be made a rule of court in the court of a justice of the peace. And that court has no jurisdiction to render judgment on an award.

APPEAL from the Montgomery Common Pleas.

BUISKIRK, C. J.—The appellant sued the appellee before a justice of the peace in Fountain county, to recover damages for an alleged fraud practised by the appellee in an exchange of horses. The appellant recovered a judgment before the justice of the peace for the sum of one hundred and thirty dollars.

The appellee, on the 13th of September, 1869, appealed from the said judgment to the Fountain Common Pleas.

On the 23d day of March, 1870, the appellee caused to be filed in said court a transcript of an appeal from a judgment on an award of arbitrators on the differences existing at that time between the said parties.

At the September term, 1870, of the said court, the two causes were consolidated.

At the September term, 1870, of the said court, upon the application of the appellant, the venue of the said consolidated cause was changed from the Fountain to the Montgomery Common Pleas, and from the presiding judge of said court to some other judge, to be procured. The change of venue from the county was perfected, and on the 2d day of February, 1871, the cause was, by the agreement of the

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parties, set down for trial before the Hon. P. S. Kennedy, an attorney of said court.

On the 11th judicial day of the February term, 1871, of the Montgomery Common Pleas, the appellant filed the following written motion:

"The plaintiff here now moves the court to dismiss the appeal from the judgment of the justice of the peace on the award of the arbitrators herein; and hereby embodies in, and makes a part of, this motion, the further motion to dismiss the appeal taken by defendant on the one-hundred-and-thirty-dollar judgment, and thereby strike this whole cause, as consolidated, from the docket."

This motion is based upon the following grounds, to wit:

"1. That the one-hundred-and-thirty-dollar judgment was and is embraced in and absorbed by the arbitration and award, and must fall with it.

"2. That no appeal lies from the said judgment upon the award returned by the arbitrators, which award, and papers connected therewith, are made a part of this motion.

"3. That all defects and irregularities in said arbitration and award had been waived by defendant, in that he interposed no exceptions or objections to judgment being entered upon said award, on Justice Yonk's docket, and that he could not now interpose any exception or objection thereto.

"WALLACE, BAKER, & BUTLER, for Plff."

Pending the above motion, the appellee filed the following written motion, namely:

"Comes now the defendant, and, pending the motion of plaintiff to dismiss the appeal in the above entitled cause, numbered 938, and which cause refers to the arbitration proceedings between said parties and the judgment thereon, moves the court to dismiss the arbitration proceedings, award, and judgment rendered thereon, for the following reasons, to wit:

"1. A justice of the peace has no jurisdiction or power to render a judgment upon said arbitration and award.

"2. The said arbitration and award professes to include a

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cause pending in a court of record, while the transcript of proceedings shows upon its face that the matter in controversy was not referred to, said arbitration by any rule of court, nor were the arbitrators mutually chosen by the parties in open court.

"3. The award, nor any paper connected with the arbitration, do not show that the arbitrators were ever sworn.

"4. The award shows on its face that Christopher Keeling, umpire, was the only party who acted in the premises.

"5. The award is too vague, uncertain, and indefinite upon its face.

"6. The arbitrators did not estimate and return with the award the costs of arbitration.

"7. The judgment upon the award differs from the terms of the award, in material and important particulars.

"8. The rule of the justice's court, for the defendant to show cause why judgment should not be rendered upon such award, was not served upon defendant for ten days before the time set for showing cause against said award.

"9. Because a material addition was made to said award on the 14th day of December, 1870, and but one of said three arbitrators signed said award previous to or on the 10th day of December, 1870; which facts are shown in affidavits marked 'A,' filed herewith and made a part of this motion and reason.

"10. Because a properly authenticated copy of said award was not delivered to Francis M. Reed, by either of the arbitrators or umpire, within fifteen days from the signing of said award; nor was it left at his last usual place of residence within said fifteen days by either of the arbitrators or umpire therein, which fact is shown by affidavit marked 'B,' filed herewith and made a part of this motion and reason."

"McWILLIAMS, COWEN, & PATTERSON,
"For Defendant."

Affidavits were filed in support of the ninth and tenth reasons. The court overruled the motion of the appellant, but sustained the motion of the appellee and dismissed the

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proceedings in, and judgment rendered on, the award of the arbitrators; to which several rulings of the court the appellant excepted, and the questions arising on such rulings are presented by bills of exceptions.

The original cause was then submitted to a jury for trial, and resulted in a finding for the appellee, who was the defendant below.

The appellant moved the court for a new trial for the following reasons: first, error of law occurring at the trial and excepted to at the time by plaintiff; second, because of a decision of the court contrary to law, as appears by bill of exceptions, duly signed and filed February 15th, 1871, which bill of exceptions is made a part of this motion.

The court overruled the motion for a new trial and rendered judgment on the verdict of the jury, to which the appellant excepted.

The appellant has assigned the following errors: first, the court erred in overruling appellant's motion for a new trial herein; second, the court erred in overruling appellant's motion to dismiss the appeal herein; third, the court erred in entertaining and sustaining appellee's motion to dismiss appeal on award, pending plaintiff's motion to dismiss appeal from justice's court on award and appeal on the one-hundred-and-thirty-dollar judgment; fourth, that the finding and judgment of the court are contrary to law and are not sustained by sufficient evidence.

The first assignment of error is the only one that presents any question for our decision, and on that two questions arise; first, did the court err in sustaining the motion of appellee to dismiss the proceedings in arbitration? and, secondly, did the court err in overruling the motion of appellant to dismiss the appeal in the original cause and the appeal from the judgment on the award? These were the only matters embraced in the motion for a new trial. The appellant having failed to assign, as a reason for a new trial, that the verdict was contrary to law and not sustained by sufficient evidence, cannot remedy the omission by an as-

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signment of error. A motion for a new trial cannot be enlarged by the assignment of errors.

The appellant had obtained a judgment against the appellee before a justice of the peace for one hundred and thirty dollars, and the appellee had appealed from this judgment to the common pleas. While this appeal was pending, the parties submitted to arbitration certain differences growing out of a horse trade. The arbitrators awarded to the appellant the sum of forty dollars. The appellee having failed to pay such sum, the appellant obtained a judgment on such award before a justice of the peace, from which judgment the appellee appealed to the common pleas, in which court the two cases were consolidated. The appellant, by his motion, sought to dismiss the appeal in the original action, because the original judgment had been merged into the award, and to dismiss the appeal from the judgment on the award, on the ground that no appeal would lie from such judgment.

The appellee, by his motion, sought to dismiss the entire action and proceedings based on the award, on the ground that the award was void, and that no valid judgment could be rendered thereon.

Neither the submission nor the bonds are made a part of the record. The only paper connected with the arbitration in the record is the award. It does not appear from the award or the judgment rendered thereon that the matter submitted to the arbitrators was the same as that involved in the original action. No reference is made in any paper before us to the pendency of any action based on the same cause of action as that submitted to arbitrators. It is true that the complaint was based upon alleged fraud in a horse trade, and that it is recited in the caption of the award that it was a case of arbitration for the purpose of settling all matters of difference arising from a horse trade. We cannot know judicially that the horse trades mentioned in the complaint and in the award were one and the same transaction; but conceding that they were the same, and that the original judgment had been merged in the award, would these facts

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justify the dismissal of the appeal? We think not. If the original judgment was merged in the award and the judgment thereon, then it had ceased to exist as a judgment, and consequently the suit should have been dismissed, and not the appeal.

We are unable to see any merits in the motion of the appellant to dismiss the appeal from the judgment on the award. If the justice of the peace had jurisdiction, a question which we will hereafter consider, and rendered a legal and valid judgment on the award, an appeal would lie from such judgment as from any other judgment rendered by a justice of the peace; and if such justice possessed no jurisdiction, then the suit, and not the appeal, should have been dismissed. It remains for us to inquire and determine whether the award and the judgment rendered thereon were valid. Various objections were urged against the validity of the award. We do not deem it necessary to pass upon all of these objections. The first objection does not go to the regularity of the proceedings in arbitration, but presents the question of whether the justice of the peace possessed jurisdiction to render any judgment on the award. If the court possessed no jurisdiction, its judgment would be void, and the court did right in dismissing the action.

The first objection is, that a submission to arbitration under our statute cannot be made a rule of court in the court of a justice of the peace, and that, consequently, the justice of the peace who rendered the judgment on the award possessed no jurisdiction over the subject of the action, and that, therefore, any judgment rendered by him would be void.

We are not aware of any adjudged case in this court bearing upon the question, and its solution, therefore, will depend upon the proper construction to be placed upon the statute regulating arbitrations and umpirages. The first section of said act, after defining who may and who may not submit matters of difference to arbitration or umpirage, provides that the persons who are authorized "may agree that such

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submission be made a rule of any court of record designated in such instrument." 2 G. & H. 342.

The thirteenth section of said act reads as follows:

"Sec. 13. Upon such submission being proved by a subscribing witness thereto, or in case of his death, insanity, or absence out of the state, then by proof thereof as in other cases of a written instrument, and upon the award also being proved in like manner, or by the arbitrators, or any of them; and upon proof that a copy of the award has been duly served on the party against whom the rule is asked, the court shall cause such submission and award to be entered of record, and shall grant a rule thereon against the adverse party, to show cause at that or the succeeding term of the court, why judgment shall not be rendered by such court upon the said award." 2 G. & H. 345.

The sixteenth section of said act provides, that "in all cases where an award or umpirage shall be presented to any court of record for a judgment to be entered thereon, whether the reference shall have been made by submission of parties as aforesaid, or by rule of court, the adverse party may show for cause against the rendition of said judgment any of the following grounds."

It is quite manifest from the first and sixteenth sections that a submission can only be made a rule of court in a court of record.

It was held by this court, in *Hooker v. The State*, 7 Blackf. 272, that the court of a justice of the peace was a court of record, because he was required to keep a docket and might fine and imprison.

But the court of a justice of the peace is one of special limited jurisdiction, which acts by virtue of statutory power, and whose acts, to be valid, must be authorized by statute. *Willey v. Strickland*, 8 Ind. 453; *Draggoo v. Graham*, 9 Ind. 212; *The Ohio, etc., R. R. Co. v. Hanna*, 16 Ind. 391.

Section 10 of the act defining the jurisdiction of justices of the peace in civil cases provides, that "justices of the peace shall have jurisdiction to try and determine suits

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founded on contracts or tort, where the debt or damage claimed or the value of property sought to be recovered does not exceed one hundred dollars," etc. 2 G. & H. 579.

By the above section, a justice of the peace has jurisdiction to try and determine suits founded upon contracts or torts, or where the title to personal property may be involved. The evident intention was to limit the civil jurisdiction of justices to ordinary suits upon contracts and torts, and replevin, or the like.

It was held by this court, in *Ainsworth v. Atkinson*, 14 Ind. 538, that an action to enforce a mechanic's lien did not come within the purview of the above section.

It was held by this court, in *Snell v. Mohan*, 38 Ind. 494, that a justice of the peace could not render a judgment to foreclose a chattel mortgage.

The language employed in the act in relation to arbitrations and umpirage clearly shows that the court of a justice of the peace was not intended. It is declared in the thirteenth section above quoted, that "the court shall cause such submission and award to be entered of record, and shall grant a rule thereon." The word cause was intended to apply to a court that had a clerk. An examination of the justices' act will show that where the legislature has required any act to be done by a justice of the peace, it provided that he shall do the thing required, not that he shall cause it to be done, except where he is required to cause others to do certain things. The court is also required by said section to enter a rule against an adverse party. Such a practice is unknown in a justice's court. It is also provided by such section that the rule shall operate "at that or the succeeding term of the court." Thus plainly showing that a court was intended which had terms, and not a court that was open at all times.

It is also provided in the fifteenth section of said act, that the rule shall be served ten days, the usual time required in the circuit and common pleas courts.

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It is also provided in the twenty-fourth section of said act, that the report shall be "entered on the order book."

We are very clearly of the opinion that a submission under our statute to arbitration or umpirage cannot be made a rule of the court of the justice of the peace, and as the court must be designated in the submission, and as the award must be filed in the court designated, it results that the justice of the peace possessed no power or jurisdiction to render judgment on the said award, and that such judgment was null and void.

There are grave objections to the award, but the conclusion we have reached renders it unnecessary for us to notice them.

We are of the opinion that the court committed no error in dismissing the action based upon the award.

The judgment is affirmed, with costs.

J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellant.

39 338
185 455

BOUSLOG *v.* GARRETT.

PLEADING.—Account Stated.—Promise to Pay.—In a paragraph of a complaint on an account stated, the allegations were, "that on the 1st day of January, 1870, the defendant was indebted to the plaintiff in the sum of one thousand and seven dollars and eighty-four cents, for money found due from said defendant to the plaintiff upon an account then stated between them; which said sum, together with the legal interest thereon, remains unpaid, for which he demands judgment."

Held, that the promise to pay was impliedly included in the allegations of said paragraph.

SAME.—The stating of the account was not conclusive, but errors might be shown and corrected under the general denial.

PRACTICE.—Demurrer.—The sustaining of a demurrer to a pleading is not available error, when the same evidence may be introduced under another pleading in the cause.

PLEADING.—Answer in Part.—A pleading which, professing to answer an entire paragraph, only answers as to a part thereof, is bad.

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PRACTICE.—Waiver of Objections.—This court declined to consider any question as to the right of a temporary judge to hold a court, where all objections thereto were waived of record by the parties.

NEW TRIAL.—Verification of Reasons.—Improper conduct of the jury, in that they added up the amount of defendant's accounts and divided by the figure 2 for the purpose of arriving at a verdict, as a cause for a new trial, must be supported by affidavit, if sufficient otherwise; and so, also, an allegation of accident or surprise which the party making the motion could not have guarded against.

PARTIAL ACCOUNT STATED.—Not Conclusive.—A partial statement of the accounts by the parties, without arriving at any balance, is not binding upon them as an account stated.

APPEAL from the Henry Common Pleas.

DOWNEY, J.—The appellee sued the appellant. The first paragraph of the complaint is on an account stated; the second was for money paid; the third was for money had and received; the fourth was for money loaned; and the fifth was for goods sold and delivered.

The paragraph on the account stated, after the commencement, is as follows:

“Nathan Garrett, plaintiff, complains of Levi Bouslog, defendant, and says that on the 1st day of January, 1870, the defendant was indebted to the plaintiff in the sum of one thousand and seven dollars and eighty-four cents, for money found due from the said defendant to the plaintiff upon an account then stated between them; which said sum, together with the legal interest thereon, remains unpaid, for which he demands judgment.”

The defendant answered, first, the general denial; second, the statute of limitations; third, payment; fourth, set-off. The fifth, sixth, seventh, and eighth each controverted an item alleged to have entered into and formed a part of the account stated, and was confined to the first paragraph of the complaint.

The plaintiff demurred to the fifth, sixth, and seventh paragraphs of the answer, separately, because they did not state facts sufficient to constitute an answer, which demurrer was sustained as to the fifth and overruled as to the sixth

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and seventh paragraphs, and the defendant excepted.

The plaintiff replied by general denial to the first, third, fourth, sixth, seventh, and eighth paragraphs; to the second, that the cause of action did accrue within six years; and to the fourth, in addition to the general denial, second, the statute of limitations; third, that the items had been settled and balanced by accounts of a like amount in favor of the plaintiff; and fourth, payment.

The cause was tried by a jury, and there was a verdict for the plaintiff, a motion for a new trial made by the defendant overruled, and judgment on the verdict.

The errors assigned in this court raise four questions; first, as to the sufficiency of the first paragraph of the complaint; second, the sufficiency of the fifth paragraph of the answer; third, as to the right of the temporary judge to hold the court; and fourth, the correctness of the ruling of the court in overruling the motion for a new trial.

We are inclined to hold that the first paragraph of the complaint is sufficient under the code, although it is not exactly according to the approved forms in the works on pleading. It may be advisable, in such a paragraph, to allege an express promise to pay the amount ascertained to be due, and this is according to the usual forms. But we think this is impliedly included in the allegations of the paragraph in question. The law implies a promise to pay the balance found to be due. 1 Chitty Pl. 356; 2 G. & H. 376, forms 10 and 11.

The fifth paragraph of the answer controverted an item which was embraced in the account stated, as we have seen, and is said to be pleaded as a counter claim. As the general denial was pleaded to that paragraph of the complaint, we think we need not inquire whether the demurrer to this special paragraph of the answer was correctly sustained or not. It is now settled that the stating of an account is not conclusive upon the parties, and that, consequently, errors therein may be shown and corrected. Prof. Greenleaf says: "But whensoever such admission was made, it is not now held

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to be conclusive; but any errors may be shown and corrected under the general issue." 2 Greenl. Ev., sec. 128. The sustaining of a demurrer to a pleading is not an error which is available, when the same evidence is admissible under another pleading in the cause. Upon an examination, however, of the fifth paragraph of the answer, we are satisfied that the court committed no error in sustaining the demurrer to it. Among other objections to it, it was pleaded as a defence to the whole of the first paragraph of the complaint for one thousand one hundred and seven dollars and eighty-four cents, and only professed to show a defence to one hundred and ninety-one dollars and fifty cents.

With reference to the authority of the judge to hold the court, the parties, by counsel, made this agreement: "It is hereby agreed that all objections to the regularity or legality of the court in which the above-entitled cause is being tried is waived, and said court shall be held and regarded by us as legal and valid in all respects; and we further declare that said term of court was appointed by the regular judge of the Henry Common Pleas court, at our mutual request, for the purpose of trying said cause. We further agree that this agreement shall be made a part of the record of this cause.

"BROWN & POLK,
"FORKNER & BUNDY,
"Plaintiff's Attorneys.
"MELLETT & MARCH,
"Defendant's Attorneys."

We presume that counsel for the appellant, when they assigned an error calling in question the authority of the judge to hold the special term, had forgotten this agreement. Supposing this to be the case, we will not further consider the question.

We are next to examine the reasons which were assigned in the motion for a new trial, in order to determine whether or not there was any error in refusing to sustain that motion. The first is misconduct of the jury who tried the cause, in this, that they added up the amount of defendant's accounts

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and divided by the figure 2, for the purpose of arriving at a verdict.

This cause for a new trial, conceding it to be sufficient, is not supported by affidavit, without which it could not be considered by the common pleas; nor can it be by us. 2 G. & H. 215, sec. 355.

The same may be said of the second cause for a new trial, which was accident and surprise which the appellant could not have guarded against. This should have been supported by affidavit.

The third is that the damages were excessive. No particular ground is pointed out in support of this reason, and we have discovered none.

The fourth reason is that the verdict was not sustained by the evidence, and was contrary to law. The main part of the argument on this point is designed to show that the evidence fails to sustain the paragraph on the account stated.

We will consider this point in connection with the objection to the third and fourth charges given by the court to the jury, to which exception was taken by the appellants. These charges are as follows:

"3. An account stated is a mutual settlement of accounts between parties, and when thus, that is, the amount due respectively to each party is stated in writing, either by the parties themselves or by a third party for them, with their assent, it is binding upon them as far as the account has proceeded, and cannot be reopened without their mutual consent, or unless there is fraud, mistake, or illegality in one or more of the items going to make up the account.

"4. If the jury find that plaintiff and defendant accounted together, and that each received a copy of the account, having agreed upon the accounting as far as it had proceeded, and differing upon the settlement of these items, or broke off the further statement of accounts altogether, yet as far as they had proceeded in the statement they will be bound."

The evidence shows that the parties attempted to make a settlement of their accounts, but disagreed before they got

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through, and made and agreed upon no balance. In our opinion, the evidence did not sustain the paragraph on the account stated. We also think that the instructions three and four were erroneous, for the reason that they informed the jury that a partial statement of the accounts by the parties, without their having arrived at any balance, was binding upon them as an account stated. It is conceded that a paragraph on an account stated may be sustained when there is an account on one side only, but there must be a demand on the part of the plaintiff, which was acceded to by the defendant. The evidence in this case shows that the parties, on an examination of their accounts, failed to make a settlement, but broke off the effort to settle. The defendant produced and insisted upon an item of five hundred dollars, and another of fifty dollars, which the plaintiff refused to allow, and at this stage of the negotiations their efforts to find a balance ceased. We think it cannot be said that the defendant acceded to any sum or amount as due to the plaintiff. Without this, the evidence was not sufficient to sustain the paragraph on the account stated. The instructions three and four, being in conflict with this view of the law, must be held incorrect. See 2 Greenl. Ev., section 126; Bouv. Law Dict., title, ACCOUNT STATED; 2 Stark. Ev. 99; 1 Chit. Pl. 358.

We omit any consideration of the other questions presented in the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

J. T. Mellett and W. March, for appellant.

J. Brown and R. L. Polk, for appellee.

PETRIE *v.* GROVER.

CONTRACT.—Defective Work.—Acceptance.—Pleading.—Where a complaint alleged that the defendant contracted to build walls and make the floor for a

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cellar, to be water-tight, and that the plaintiff was to furnish the cement, which he had done, but, owing to the unskilfulness of the defendant, the walls and cellar floor were not water-tight; and the answer averred that the plaintiff had accepted the work, and given his note for the balance unpaid, which note was made a counter claim;

Held, that a reply was bad which admitted the execution of the note, but averred its only consideration to be the contract to build a cellar water-tight for the plaintiff, who was to furnish the cement, and that he had furnished fifty barrels of cement, but owing to the unskilfulness of the defendant, the cellar was not water-tight; the reply not alleging that fifty barrels were sufficient, or that the plaintiff did not know of the defect in the work when he gave his note.

APPEAL from the Cass Common Pleas.

PETTIT, J.—The appellee sued the appellant, alleging, in substance, that appellant agreed, for eight hundred dollars, to build the walls and floor of a cellar, water-tight, for appellee, he furnishing the hydraulic cement, and appellant to furnish all other materials and do the work; and alleging that he had paid the eight hundred dollars and furnished the cement, and that the work was done in an unskillful manner, and that the walls and floor were not water-tight, and claiming one thousand dollars damages.

The answer was, first, general denial; second, in substance, that after the work was done, there was a final settlement between the parties, and the work accepted by the plaintiff; and that he gave the defendant his note for one hundred and thirteen dollars, the balance due him for work done and materials furnished on and for said walls and floor; and the note growing out of the same transaction on which the suit was brought was pleaded as a counter claim, and judgment asked for its amount.

The reply was, first, the general denial; second, in substance, admits the execution of the note, but says that the only consideration for it was the agreement of appellant to build for appellee a cellar of stone, water-tight; that the appellee furnished for appellant fifty barrels of cement to be used in said work; that the appellant used it unskillfully, and the walls were not made water-tight, and therefore the consideration for the note had wholly failed. To the second para-

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graph of the reply to the second paragraph of the answer, there was a demurrer for want of sufficient facts overruled, and exceptions taken; and this ruling is assigned for error. We hold that the reply was clearly bad, first, because it did not show that fifty barrels of cement (the plaintiff being bound to furnish the necessary amount) was sufficient to enable the defendant to make the cellar water-tight; second, because it does not show that appellee did not know of the defect in the work at the time of the final settlement and the giving of the note. The court erred in overruling the demurrer to this reply; and as all subsequent proceedings ought not to be in the record, we hold that they do not properly arise in it, and need not be noticed by us.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer of the appellant to the second paragraph of the appellee's reply to the second paragraph of the appellant's answer.

C. D. Prott, N. O. Ross, R. P. Effinger, and R. Magee, for appellant.

THE BOARD OF COMMISSIONERS OF MONROE COUNTY *v.* WOOD.

SOLDIERS.—Bounty.—An order was passed by the board of commissioners of Monroe County, that they "agree and do give to each volunteer from Monroe county, under the present call for," etc., a certain sum to be paid in cash or county orders, "upon the full quota being made up and mustered into the service of the United States." This order was amended, "so that each man volunteering, and being legally mustered into the service of the United States shall be entitled to and receive a warrant on the treasury of Monroe county for one hundred dollars; said warrant to be issued whenever satisfactory proof is made to the auditor that said volunteer has been duly mustered into the service of the United States."

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162 62

Held, that the first order entitled the volunteer who complied with the order to the bounty, upon the full quota of the county being made up. The amended order did not take away the right to the bounty given in the original order, but left out the condition as to making up the quota in full. It authorized the

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auditor to issue the warrant on satisfactory proof made before him; but this did not make the furnishing of such proof to the auditor a condition precedent to the right of the volunteer to receive the bounty, or to his right of action to recover it.

Held, also, that where a citizen of Monroe county volunteered while these orders were in force, and was mustered into service and credited to Monroe county, the right to the bounty was made out.

SAME.—Repeal of Order.—On March 11th, 1864, these orders were repealed, and it was “directed that no order or warrant be issued to any person who shall volunteer in the service of the United States, or who shall be mustered into said service after this date.”

Held, that the repealing order could not defeat any right acquired by a volunteer under the repealed orders prior to the date of the repeal.

APPEAL from the Monroe Common Pleas.

WORDEN, J.—Complaint by the appellee against the appellant, alleging the following facts: that on the 17th of November, 1863, the defendant passed the following order, viz.: “On motion, the said board, after mature consideration and consultation with prominent citizens and tax-payers of Monroe county, agree and do give to each volunteer from Monroe county, under the present call for one hundred and forty-three men, one hundred dollars each; the said amount as bounty to be paid in cash or county orders upon the full quota being made up and mustered into the service of the United States.”

At the December session of the board, 1863, the following order was made by said board: “On motion, it is ordered by the board, that the order made at the special term of this court allowing one hundred dollars to each man volunteering under the late call of the President of the United States, whenever one hundred and forty-three men, the quota of Monroe county, shall be received and mustered into the service of the United States, be and the same is hereby amended, so that each man volunteering and being legally mustered into the service of the United States, shall be entitled to and receive a warrant on the treasurer of Monroe county for one hundred dollars; said warrant to be issued whenever satisfactory proof is made to the auditor that said

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volunteer has been duly mustered into the service of the United States."

At the March term, 1864, the board made the following order: "And now, on motion, it is ordered by the board that the said order and amended order be and they are hereby repealed, and it is directed that no order or warrant be issued to any person who shall volunteer in the service of the United States, or who shall be mustered into said service after this date. Signed, one o'clock, March 11th, 1864."

That, in accordance with the amended order, and by reason thereof, and while the same was in force, to wit, on the 29th day of December, 1863, said plaintiff enlisted and was duly mustered into the military service of the United States, and credited to said county of Monroe; that said plaintiff demanded of the auditor of said county and of the board of commissioners, after making satisfactory proof to them that he had been duly mustered into the military service of the United States and credited to said county of Monroe, a warrant on the treasurer of said county for one hundred dollars, to which he was entitled under said order, which demand was refused; wherefore, etc.

The defendant demurred to the complaint, for the want of facts sufficient, etc., but the demurrer was overruled and defendant excepted.

The general denial was filed, and the cause tried by the court. Finding and judgment for the plaintiff, a motion for a new trial interposed by the defendant having been overruled.

The cause was submitted on an agreed statement of the facts, as follows: "For the purposes of this trial, the following was agreed upon as the facts in the cause." (Here follows a statement of the passing of the orders by the board as they are set out in the complaint.) "That said Emsley Wood was a resident of Monroe county, Indiana; that on the 20th day of December, 1863, said Wood enlisted, and on the 29th day of December, 1863, was duly

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mustered into the service of the United States for the term of three years, as a corporal of company G, thirty-eighth regiment of Indiana volunteers, and credited to Monroe county, Indiana; that the quota of said county at that time was not full; that said Wood, being absent from home in the service of the United States, did not apply for said one hundred dollars bounty offered by said county, or notify the auditor thereof that he intended to claim said bounty, for three or four months after the repeal of said order on the 11th day of March, 1864, and after the quota of said county had been filled; that said soldier remained in the service of the United States until the close of the war, when he was duly discharged."

Error is assigned upon the ruling below in overruling the demurrer to the complaint, and also upon the overruling of the motion for a new trial.

The two questions thus raised may be considered together, as the complaint is abundantly good, if the facts, as agreed upon, are sufficient to entitle the plaintiff to recover.

The repealing order of the board of the date of March 11th, 1864, cannot defeat any right acquired by a volunteer under the repealed orders prior to that date. Indeed, the repealing order was not intended to work any such result; for, while the former orders were in terms repealed, it was ordered that no order or warrant be issued to any person who should volunteer, etc., after that date, leaving the implication irresistible that it was intended that orders or warrants should be issued to those who had previously volunteered, etc., in accordance with the former orders.

But it is insisted, as we understand from the brief of counsel for the appellant, that as the complaint does not show that the appellee made the satisfactory proof to the auditor that he had been mustered into the service, etc., before the repealing order was made, it is insufficient, and that the demurrer should have been sustained. It is also insisted that, as the evidence fails to show that such proof was made

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to the auditor at any time, the case was not made out, and the motion for a new trial should have prevailed.

We think it quite clear that the complaint was good, and that though the volunteer be required to furnish to the auditor the proof specified in the amended order of the board before the auditor could be required to issue the warrant, still that proof could be furnished after the repealing order as well as before.

The repealing order did not, in our opinion, have the effect of cutting off the right of those who had volunteered, etc., under the former orders, but who had not then furnished the proof to the auditor.

The case was made out by the evidence. The agreed statement of facts shows that the appellee had done every thing necessary to be done in order to entitle him to the bounty, although it does not show that he furnished the satisfactory proof to the auditor before bringing this suit. We construe the orders of the board as follows: the first order entitled the volunteer who complied with the order to the bounty, upon the full quota of the county being made up. The amended order did not take away the right to the bounty as provided for in the original order, but it left out the condition as to making up the quota in full; and it provided for the issuing of the warrants by the auditor when satisfactory proof should be made before him of the necessary facts. This was a matter of convenience. The auditor was authorized, upon satisfactory proof being made before him to issue the warrants, without referring the matter to any other authority or tribunal; but this does not make the furnishing of such proof to the auditor a condition precedent to the right of the volunteer to receive the bounty, or to his right of action to recover it. Doubtless a writ of mandate would not lie against the auditor to compel him to issue the warrant until the proof had been made before him, because until then he would not be authorized or required to issue the warrant. The right of the soldier to the bounty would not be established, and the auditor would have no

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right to pass upon it, except upon the terms of the proof being made before him. But the right of the auditor to hear proof, and upon that to issue the warrant, does not deprive the soldier of his right to the bounty, nor of his right to resort to the courts for the purpose of establishing his right thereto.

A contrary construction would, or might, work results that could not have been intended by the board of commissioners, as is to be gathered from the orders in question. If the soldier is not entitled to the bounty until he has furnished to the auditor "satisfactory proof," then the auditor is made the sole arbiter of the question. The proof must be satisfactory to the auditor, or the soldier is not entitled to the bounty. No matter how satisfactory the proof might be to the ordinary tribunals of the country, if it did not satisfy the auditor, the soldier would have no remedy.

We think the just and legal interpretation of the orders in question is, that the auditor is authorized to issue a warrant when satisfactory proof is made before him of the necessary facts, and that otherwise he is not, but the soldier is left to assert his right to the bounty in some other way, as by application to the board itself, or by suit in the courts, where he can make the necessary proof.

But it is insisted by the counsel for the appellant that the case is not made out in another respect. They state the point as follows: "In this case there was a specific offer of a certain sum, on specific terms, at a certain time or between certain days. To make the county liable, something more was necessary than the doing of some act within the description of acts sought to be induced by the offer. The act done must have been performed not only with a view to complying with the terms of the offer, but in such manner as that the assent of the county, through its agents, could be at least fairly inferred to the particular act. The act, the thing done, it must be shown, was moved by the county, be done at its instance, or be subsequently adopted and accepted by the county, or there can be no liability of the county."

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We are of opinion that, as the agreed statement of the facts shows that the appellee was a citizen of Monroe county, and that before the repealing order of the board was passed, he volunteered under the call of the President for troops, and was mustered into the service and credited to Monroe county, the case was abundantly made out. The appellee complied strictly with the terms of the offered bounty, and were it necessary, it might be fairly presumed that in entering the service and being credited to Monroe county, he acted with a view to the bounty offered. On the other hand, the county may well be presumed to have assented to his thus entering the service, and being credited to that county, as that was the precise object for which the bounty was offered, and the county was to that extent relieved from the call for troops. But we doubt whether either of these presumptions is necessary to make out the case. It is laid down in 1 Story Con, sec. 380 *a*, that "the offer of a reward or compensation for the performance of any service, as, for instance, for the finding and returning of money or any lost article, is a case of a conditional promise; and if any one coming within the terms of the offer shall, before its revocation, perform the service, a legal and binding contract arises to pay the reward." See *Wentworth v. Day*, 3 Met. 352; *Freeman v. City of Boston*, 5 Met. 56.

In *Harson v. Pike*, 16 Ind. 140, it was decided that it is not necessary that notice should be given to the party offering the reward that his proposal is being acted upon; and in the case of *Dawkins v. Sappington*, 26 Ind. 199, it was held, that a person performing the service for which a reward was offered, was entitled to the reward, although he did not know, at the time of the performance, that it had been offered, and, of course, was not actuated by it.

The judgment below is affirmed, with costs.

BUSKIRK, C. J., having been of counsel in the cause, was absent, when it was considered.

W. R. Harrison and W. S. Shirley, for appellant.

J. H. Louden and J. M. McCoy, for appellee.

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NOBLE *v.* THE STATE, EX REL. HINES.

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BASTARDY.—*Entry of Provision for Child.—Violation of Promise.—Complaint to Vacate Entry.*—In a prosecution for bastardy, the relatrix, on the 29th day of September, 1868, appeared in open court and acknowledged that satisfactory provision had been made for the maintenance of the bastard child; and an entry was made thereof, and the prosecution was dismissed. On the 10th day of December thereafter, the relatrix filed her complaint, verified, and a motion to set aside this entry and dismissal of the prosecution, on the ground that the consideration of her consent to such entry was the promise of the defendant to marry her on the 5th day of November, 1868, which she had relied on; but that he had failed and refused to fulfil his promise, and had never intended to do so.

Held, that the facts stated were not sufficient on demurrer.

PLEADING.—Answer.—Provision by Payment of Money.—An answer, alleging that the consideration of the entry and dismissal was the payment by defendant to her of a certain sum of money was held good.

SAME.—Answer.—Recovery on Promise.—An answer that the relatrix had brought suit upon the promise of marriage and recovered a judgment for a certain amount against the defendant was also held sufficient.

APPEAL from the Howard Circuit Court.

DOWNEY, J.—There was a prosecution for bastardy commenced on the 20th day of February, 1868, before a justice of the peace against the appellant. After an examination of the charge, the justice of the peace recognized the defendant to the circuit court. After one or more continuances, on the 29th day of September, 1868, in the circuit court, the following entry was made:

“Comes now the relator in person, and by A. F. Shirts, her attorney, and comes also the defendant, by Thomas J. Kane, his attorney; and the relator, Roxana Hines, in person, comes into open court and acknowledges that provision has been made by the defendant to her satisfaction for the maintenance of the bastard child named in the relator’s complaint. It is therefore considered by the court that this cause be dismissed at defendant’s costs. It is therefore considered by the court that the relator recover of the defendant all her costs and charges in this behalf by her paid, laid out, and expended, taxed at —— dollars and —— cents.”

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On the 10th day of December, 1868, the relator filed her complaint and motion for a new trial, in which she alleged that before the dismissal of said prosecution, the defendant solemnly promised to marry her on the 5th day of November, 1868, in consideration of which she promised to marry him, and that in consideration thereof she agreed to dismiss said prosecution; that no provision was made by the defendant for the maintenance of said child, except his promise to marry the relator, and thus make said child legitimate and furnish it a home, where he would be bound by law to support it; that the relator, at the time she made said agreement, and until the 5th day of November, 1868, firmly believed that the defendant was acting in good faith, and that he intended to marry her on said day, and thus render her child legitimate, and therefore appeared in court and made said entry; that she has since ascertained that said promise of the defendant to marry her, etc., was made falsely, for the fraudulent purpose of getting her to make the admission as aforesaid, and thus defraud her out of a maintenance for said child, and that, in fact, he never had any intention whatever of performing said promise on his part; that she was surprised by the fraud of said defendant, and could not have guarded against it by the use of ordinary prudence; that she had no suspicion of his fraud until, etc., and did not discover it until the said 5th day of November, 1868, when he refused to perform his said promise. Wherefore, inasmuch as the said entry is a bar, as it now stands, to all other prosecutions for the same purpose, the plaintiff asks for the vacation of said entry and a new trial of said cause, and for other proper relief. This pleading is verified by the oath of the relator.

The defendant demurred to this complaint, as it is called, on the ground that it did not state facts sufficient, but his demurrer was overruled, and he excepted. He then answered, first, the general denial; second, that the consideration of the entry of satisfaction was the payment of four

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hundred dollars, two hundred of which was paid at the time, and the other two hundred had been paid after the commencement of this action; third, that at the March term, 1869, of the Hamilton Circuit Court, the relator brought her action against the defendant on the marriage contract set up by her in her complaint, and recovered judgment in said action for the sum of fifteen hundred dollars in damages. A copy of the recovery is made part of this paragraph of the answer.

The relator demurred to the second and third paragraphs of the answer, on the ground that neither of them contained facts sufficient to constitute an answer, and her demurrers were sustained, and the defendant excepted. The issues were tried by a jury, and there was a verdict as follows: "We, the jury, find for the plaintiff." In answer to interrogatories, the jury further found as follows:

"First. Did the plaintiff demand marriage at the hands of the defendant before the commencement of this suit? if so, when and where? Answer. We don't know.

"Second. Did the defendant, on or about the 13th day of August, pay the plaintiff the sum of two hundred dollars? if so, on what account did he make such payment? Answer. We don't know."

The defendant moved for a new trial, but his motion was overruled, and he excepted. The court rendered judgment, setting aside the entry of satisfaction and the judgment thereon dismissing the prosecution, and granting a new trial of said cause, requiring the defendant to enter into a recognizance to appear at the next term, continuing the cause until the next term, and rendering judgment for the costs of said proceeding against the defendant.

The evidence is in the record by bill of exceptions.

The errors assigned involve the correctness of the rulings of the court, first, in holding the complaint sufficient; second, in holding the answers insufficient; third, in not rendering judgment for the defendant on the verdict; and, fourth, in refusing to grant a new trial.

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The demurrer to the answer reached back to the complaint, and it is insisted by the appellant that the complaint is insufficient. We think this opinion of counsel for the appellant is correct. The bastardy suit was at an end by the entry made by the prosecutrix that provision to her satisfaction had been made for the support of the child. 2 G. & H. 628, sec. 17. This action was instituted, nominally as a complaint for a new trial, but really to set aside the compromise or entry of satisfaction made by the prosecutrix, and the judgment of dismissal founded upon it.

The complaint makes no case of fraud. It sets up, as the consideration of the compromise, the promise of the defendant that if the relator would make the entry and dismiss the action, he would marry her, at a designated time, and thus render the child legitimate and secure its support; and alleges a failure on his part to perform this promise. This does not constitute fraud, according to any definition or adjudication with which we are acquainted. *Fouty v. Fouty*, 34 Ind. 433. If, instead of a promise to marry the relator at a fixed time, the defendant had promised to pay her a sum of money at a designated date, and had failed to make the payment, could it be supposed that the failure to pay the money would revive her right to prosecute under the statute for the support of the child? It was not the marriage which was the consideration of the compromise, for that was not to take place until a subsequent day; but it was the promise of the defendant to marry her which was the consideration for which she agreed to, and did, dismiss the action. If one sell property on credit, to be paid for at a future time, and, on his part, execute the contract by the delivery of the property, can he, if the money shall not be paid at the time agreed upon, recover the property back from the party to whom it was delivered, on the ground that the failure to pay constituted a fraud? We think not. The promise to marry, under such circumstances, and for such a consideration, would undoubtedly be valid, and would support an action in favor of the relator. The statute gives her

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the right to make the entry of satisfaction and dismiss the action, and in this case she had the advice and assistance of her counsel, who seem to have been present in court when the entry was made. There was a consideration for the agreement on her part in the promise of the defendant. We cannot say that it was not such a provision as is contemplated by the statute. If the promise was not performed, it furnished her a cause of action which might yield her the means of support for the child.

When we come to look at the paragraphs of the answer to which demurrers were sustained, the rulings of the court seem wholly indefensible. In the second paragraph it is alleged that the consideration of the agreement was that the defendant should pay her four hundred dollars in money for the support of the child, and that the one-half of the amount was paid at the date of the agreement, and the other half afterward. Her receipt for the money is filed with the paragraph of the answer. We see no reason why this was not a good defence to the action, and think the demurrer to it was improperly sustained.

The third paragraph alleges that the relator instituted an action on the marriage promise mentioned in her complaint, and that she recovered thereon the sum of fifteen hundred dollars. If this be true, then she has got, by means of the compromise, resulting from her action for the breach thereof on the part of the defendant, fifteen hundred dollars. Taking the allegations of the two paragraphs together, and they show that she received, in money, four hundred dollars, and recovered her judgment for fifteen hundred dollars, making, in all, nineteen hundred dollars. If it is true, as alleged in the third paragraph, that she sued on the promise to marry, which was the consideration for the compromise, and recovered a judgment thereon, she cannot now repudiate that agreement, and prosecute a suit under the statute for further support for the child. If it could be supposed that, in cases of this kind, something may be given punitive in its nature

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against the defendant, it would seem that that object had been accomplished already in this case.

The judgment is reversed, with costs; and the cause is remanded, with instructions to sustain the demurrer to the complaint.

G. H. Voss, for appellant.

D. Moss and A. F. Shirts, for appellee.

CASS *v.* KRIMBILL.

COURT.—*Adjournment and Adjourned Term.*—It is not necessary for a court to assign reasons for an adjournment and the holding of an adjourned term.

PRACTICE.—*Reasons for New Trial.*—“Error of the court during the trial in excluding the evidence of the defendant,” is not sufficiently definite as a reason for a new trial.

APPEAL from the Porter Common Pleas.

PETTIT, J.—The appellee was sheriff of Porter county, and had several executions against one Mitchell in his hands for collection, and levied them on sheep and other stock of Mitchell’s, and, without a delivery bond, the sheriff left the property in the custody of the defendant, Mitchell. When the day of sale came, the property levied upon was missing, and could not be found or offered for sale. The plaintiffs in the judgments on which the executions were issued sued the sheriff and obtained judgment against him for the respective amounts of their executions.

Krimbill sued Cass, reciting in full form the above facts, and charging him with wrongfully taking away the property, asking judgment, etc. Issues were properly formed; trial by jury; verdict for plaintiff; motion for a new trial, on the following grounds: “first, excessive damages; second, error in the assessment of damages, in this, to wit, in estimating the costs and interest on the judgment offered in evidence by the plaintiff; third, that the verdict is not sustained by sufficient evidence; fourth, error of the court, during the

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trial, in excluding the evidence of the defendant." This motion was overruled, and exception taken.

We are satisfied, by the record, that the damages are not excessive, that there was no error in the assessment of damages, and that the verdict is fully sustained by the evidence. These points are not urged, nor is it pretended that they are not merely formally made.

The fourth reason for a new trial is, "error of the court, during the trial, in excluding the evidence of the defendant." This court has, in numerous and often-repeated rulings, held that this is not a sufficient reason for a new trial, for not pointing out the particular evidence that was supposed to have been improperly excluded.

The errors assigned are as follows:

"1. The court tried said cause at an adjourned term of the court, without any reasons assigned for the appointment of the same, and hence without legal jurisdiction.

"2. The court erred in excluding legal evidence, offered and excluded, and exception taken at the time.

"3. In admitting illegal evidence, objected to at the time; objection overruled, and exception duly taken.

"4. In overruling motion for a new trial, duly made, and exception to overruling taken, on account of errors during the trial, and for excessive damages."

As to the first assignment of error, we have to say that it was not necessary to assign reasons for the adjournment. *Casly v. The State*, 32 Ind. 62, and cases there cited.

As to the second and third, we say and repeat what has often been held in this court before, that they are no assignments of error, but only reasons for a new trial. The fourth error assigned is sufficiently answered under and on the motion for a new trial.

The only question presented in the appellant's brief is the admission of illegal evidence on the trial, and we have above held and ruled that this was not properly presented to the court.

The Indianapolis, Cincinnati, and Lafayette Railroad Company *v.* Dunden.

We are satisfied, from all the case, that no wrong was done to the appellant.

The judgment is affirmed, at the costs of the appellant, with two per cent. damages.

S. F. Anthony, F. Church, S. E. Perkins, and S. E. Perkins Jr., for appellant.

T. F. Merrifield and F. Bradley, for appellee.

THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD COMPANY *v.* DUNDEN.

PRACTICE.—*Paragraph Struck Out.*—Where a paragraph of an answer is struck out on motion, the ruling can only be presented for review in the Supreme Court by bill of exceptions.

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APPEAL from the Shelby Circuit Court.

DOWNEY, J.—The errors assigned in this case present two questions for our consideration; first, the propriety of the action of the court in striking out the second paragraph of the answer; and, second, in refusing to grant a new trial on the application of the defendant.

The action was brought to recover damages for the death of the infant child of the plaintiff, caused, as alleged, by the negligence of the defendant, on the Martinsville Railroad, which was being run and controlled by the defendant. The defendant answered in two paragraphs; first, the general denial; and, second, a special paragraph. The special paragraph was stricken out, on motion of the plaintiff. There was a trial by jury, verdict for the plaintiff, motion for a new trial by the defendant overruled, and judgment on the verdict.

The question relating to the striking out of the second paragraph of the answer is not presented by bill of exceptions, and is not therefore before us, so as to enable us to decide it. *Oiler v. Bodkey*, 17 Ind. 600. There are other cases.

The reasons for a new trial are as follows: first, because

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the verdict is not sustained by sufficient evidence; second, because the verdict of the jury is contrary to law; third, because the damages assessed by the jury are excessive.

The evidence does not present a case which would justify this court in reversing the action of the circuit court in refusing to grant a new trial. The damages found by the jury were four hundred dollars. This was not excessive. Counsel for appellant argue questions not presented. The admissibility of certain evidence and the giving and refusing of instructions, the questions most discussed by them, are questions not presented in the motion for a new trial, and hence not properly reserved for our consideration. *Buell v. Shuman*, 28 Ind. 464. There are many other cases.

The judgment is affirmed, with costs and five per cent. damages.

E. H. Davis and C. Wright, for appellant.

B. F. Love, B. F. Davis, and J. Odell, for appellee.

LEARY *v.* THE STATE.

LIQUOR LAW.—*Indictment.*—An indictment for selling intoxicating liquor need not state the kind of liquor sold.

SAME.—“*Barter and Sell.*”—An allegation that defendant “did barter and sell,” with an averment that the liquor was sold for twenty cents, is good, the word barter being regarded as mere surplusage.

SAME.—*Allegation.—Proof.*—An allegation that the liquor was sold to be drank in the house, out-house, stable, yard, and garden where sold, does not vitiate the indictment, but may enlarge the proof to be made by the State.

FEES AND SALARIES.—*Constitutional Law.*—The fee and salary act of 1871, so far as it fixes fees, is constitutional.

APPEAL from the Hendricks Circuit Court.

BUISKIRK, C. J.—The appellant was indicted, tried, and convicted in the court below for selling intoxicating liquors by a less quantity than a quart at a time. A motion was

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made to quash the indictment, but was overruled by the court. A motion for a new trial was made and overruled.

It is insisted by the counsel for appellant that the indictment was defective in several respects.

First. That it did not state what kind of liquor was sold. There is nothing in this objection. *Houser v. The State*, 18 Ind. 106; *Downey v. The State*, 20 Ind. 82; *The State v. Mondy*, 24 Ind. 268.

Second. It was claimed that the indictment was bad, because it averred that the defendant did barter and sell. It is alleged that the liquor was sold for twenty cents. This allegation makes it a sale. A barter is an exchange of one article for another. The word barter will be regarded as mere surplusage. It cannot vitiate the indictment. There is nothing in this objection.

It is next maintained that the indictment was bad, because it alleged that the liquor was sold to be drank, and suffered to be drank, in the house, out-house, stable, yard, and garden where sold. The allegation that the liquor was to be drank in all the above named places would not render the indictment bad, but it might enlarge the proof to be made by the State.

After the finding and judgment in the court below, the appellant moved the court to tax no costs against him, because there is no law now in force in this State authorizing the taxation of costs against him, when he was indicted before the fee and salary law of 1871 passed. The motion was overruled, and the question is preserved by a bill of exceptions. The point made is, that the fee and salary act of 1871 repealed all other laws upon the subject, and that such act is unconstitutional and void. We have, by a unanimous opinion of the court, held that such act was valid, so far as it related to the fees therein prescribed, but we were equally divided upon the question of whether that portion of the law which required such fees to be paid into the county officers' fund was constitutional. There is no doubt that the fees therein specified may be charged, taxed, and collected,

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but it is an open question as to what shall be done with such fees when collected.

We are of the opinion that the court committed no error in overruling the motion to quash the indictment and the motion in reference to the costs.

The evidence not being in the record, no question arises in the record based upon the action of the court in overruling the motion for a new trial.

The judgment is affirmed, with costs.

C. C. Nave and C. A. Nave, for appellant.

B. W. Hanna, Attorney General, for the State.

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DRAINING ASSOCIATION.—*Suit on Assessment.—Defect in Articles of Association.*—In a suit by a draining association to compel the payment of an assessment made upon the lands of the defendant, the articles of association are not properly part of the complaint, and if it be attempted to make them a part thereof, advantage cannot be taken of a defect in them by demurrer.

APPEAL from the Madison Circuit Court.

DOWNNEY, J.—This was a suit to compel the payment of an assessment made on the lands of the appellee in favor of said draining association. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was sustained. The plaintiff excepted, and appealed to this court, and has here assigned this ruling of the court for error.

The only point discussed by counsel is, whether the description of the drain in the articles of association is sufficiently definite or not. Counsel for the appellant contend that it is, while counsel for the appellee insist that it is not.

The question is supposed to be before us, because a copy of the articles of association is filed with the complaint and referred to therein.

It was held by this court, in *The Jordan Ditching and*

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Draining Association v. Wagoner, 33 Ind. 50, that in an action like this, the complaint need not contain the articles of association, or allege their substance; and in *The Excelsior Draining Co. v. Brown*, 38 Ind. 384, it was decided that the articles of association are not made a part of the complaint by the filing of a copy thereof with the complaint, and referring to it in the complaint. The action is not founded on the articles of association, and they are neither necessarily nor properly made a part of it.

It being conceded that the demurrer was sustained to the complaint for a matter thus entirely outside of it, and there being no objection shown to the complaint itself, the demurrer was improperly sustained.

The judgment is reversed, with costs, and the cause remanded.

M. S. Robinson and W. March, for appellant.

F. W. Sansberry, E. B. Goodykoontz, and D. Moss, for appellee.

MILLHOLLAND v. BRYANT.

ELECTION.—Ballot.—Distinguishing Marks.—The words "Republican Ticket," or "Republican County Ticket," or "Republican Township Ticket," upon the face of a ballot do not authorize the rejection of the ballot, under the 23d section of the registry act of 1867.

APPEAL from the Hendricks Circuit Court.

DOWNEY, J.—This was a proceeding by the appellant against the appellee to contest his election to the office of township trustee. Before the commissioners, and also on appeal in the circuit court, the proceeding was dismissed, on the ground that there was no legal and sufficient ground of contest stated in the complaint filed. The errors assigned require us to decide upon the correctness of this ruling. The ground of contest stated by the appellant is, that all the bal-

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lots cast for his opponent, the appellee, had upon them distinguishing marks other than the names of the candidates and the office which they were to fill, in violation of the twenty-third section of the registry law of 1867. The distinguishing marks, which were on the face of the ballots, were these: first, "republican ticket;" second, "republican county ticket;" third, "republican township ticket."

According to the opinion of this court, in *Druliner v. The State*, 29 Ind. 308, and other cases following it, the question must be decided against the appellant.

The judgment is affirmed, with costs.

W. A. McKenzie, L. M. Campbell, M. M. Ray, and —— Ray, for appellant.

McGOLDRICK ET AL. *v.* SLEVIN ET AL.

APPEAL from the Tippecanoe Civil Circuit Court.

PETTIT, J.—The title given to this case in the assignment of errors is *Margaret McGoldrick et al. v. James Slevin et al.*, while the appellants and appellees are numerous (six of the former and four of the latter). The appeal must be dismissed for not complying with rule first of this court, in not setting out the full names of all the parties.

The appeal is dismissed, at the costs of appellants.

H. W. Chase and J. A. Wilstack, for appellants.

S. A. Huff, B. W. Langdon, and J. S. Pettit, for appellees.

BALL *v.* THE CITIZENS' NATIONAL BANK.

CONTRACT.—*Garnishee.—Warranty.*—A contract recited that certain personal property was sold by A. to B., with a warranty that the value was a certain

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amount; and that the goods were to be paid for by C., who accepted the contract and agreed to comply with its terms.

Held, in an action by D. against A., in which process of garnishment was taken against C., that the latter might set up, as a defence to a note given by him to A. under said contract, the failure of consideration, in that the property was not of the value warranted, although the property had been delivered to B.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The bank sued Patrick M. Culling, and, in connection with such action, sued out an attachment, and garnished Ball and McHugh. Culling made no defence. Ball and McHugh, the garnishees, answered by the general denial, and Ball further answered that the supposed indebtedness grew out of the following contract:

"This witnesseth that the undersigned, Patrick M. Culling, of Indianapolis, Indiana, has this day sold, assigned, transferred, and delivered to Francis J. McHugh, of Lafayette, Indiana, all and singular the stock of dry goods, wares, and merchandise owned by him and now constituting his stock in trade in the premises known as No. 72 West Washington street, Indianapolis, together with all the fixtures appertaining to his business in said premises; for all of which property so sold, the said McHugh pays and agrees to pay the following consideration, upon the terms hereinafter named, viz., fifteen hundred dollars cash in hand, the receipt of which is hereby acknowledged; thirty-five hundred by note of Owen Ball, dated June 11th, 1870, and made payable to the order of said Patrick M. Culling three days after its date, without relief from valuation or appraisement laws; and four thousand dollars by the conveyance by said Ball and his wife to said Culling, or such person as he may designate by his order, of lots Nos. 11 and 13 in the original plat of the incorporated village of Quincy, in Logan county, Ohio, and lots 20 and 21 in Canby's Addition to said town. Said sale being made, and said consideration given and to be given, upon the express proviso that said Culling warrants his ownership and title to said property sold by him, and his right to convey the same, and that the stock of dry goods comprehended in the sale amounts in value, by said original

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invoice or cost, or when invoices are taken by their true value, to sixteen thousand dollars in the aggregate.

"PATRICK M. CULLING.

"LAFAYETTE, IND., June 11th, 1870."

"I hereby accept the foregoing agreement, and agree to comply with the terms thereof relating to my action, upon the terms specified in said foregoing agreement.

"June 11th, 1870.

OWEN BALL."

It is further alleged in the said paragraph of said answer, that Ball entered into the contract as agent for McHugh ; Ball, for himself, agreeing to pay the said consideration ; that he paid the said sum of fifteen hundred dollars, and executed his note, as in the agreement required, for thirty-five hundred dollars, and has been, and now is, ready to perform all of said agreement, and to pay said note, when the said Culling shall perform his part of the same ; that upon the execution of said agreement, said Culling gave possession of the said stock of goods to said McHugh, and the said McHugh proceeded to invoice the same ; and that the said stock of goods did not amount to the sum of sixteen thousand dollars, according to the original invoice or cost, but only to the sum of five thousand dollars ; and that by the terms of the said purchase and contract, the price of said goods, at forty per cent. off said invoice price, which was the contract price, said invoice is only about three thousand dollars ; which sum, less the fifteen hundred dollars so paid by Ball, he owes and is willing to pay, if any balance shall be found due under said contract, etc.

At this stage of the case, the garnishment as to McHugh was dismissed by the plaintiff. In the reply, the plaintiff states, that at the commencement of the proceeding and service of the process, Ball was indebted to Culling in thirty-five hundred dollars on his note and four thousand dollars in a bond for certain real estate, etc., and has no defence against said claims.

A trial of said issues being had before the court without a jury, it was found by the court that Ball was indebted to

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Culling in the sum of twenty-five hundred dollars on said promissory note, and was bound to convey to him the said real estate by virtue of the said agreement.

Ball moved the court to grant him a new trial, because, first, the finding of the court against the garnishee is not supported by the evidence; second, the amount found against the garnishee in favor of the said creditors is in excess of the amount to which they were entitled under the evidence; third, the finding of the court is contrary to law.

This motion was overruled, and judgment rendered against Ball, the garnishee, for thirty-six hundred and twenty-two dollars and fifty cents, and that the interest of Culling in said real estate in Ohio, under said contract, be sold by the sheriff, as other lands are sold on execution; and that said amounts be paid into court as a fund to be distributed among the creditors of Culling.

The evidence is in the record by a bill of exceptions. Two questions are presented by the assignment of errors; first, the correctness or incorrectness of the action of the court in refusing a new trial; and, second, as to the legality of the judgment rendered by the court.

The first point resolves itself into a question of law. It seems to be conceded that the goods fell greatly below sixteen thousand dollars in amount, estimated according to the contract. It is insisted, however, by counsel for the appellant, that Ball cannot set up this fact as a reason why he shall not pay the whole amount of his note and convey the real estate mentioned in the contract. We are not of this opinion. The goods, it is true, were purchased by Ball for McHugh, but Ball became, by his agreement appended to the contract of Culling, bound to pay for the goods; and it is expressly provided in his agreement that he is to comply with the terms thereof upon the terms specified in the agreement of Culling. McHugh is not a party to the written contract. It is the contract of Culling of the one part and Ball of the other part. Ball bound himself to do certain things, in consideration of the doing of certain things by Culling. It is imma-

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terial who got the goods. That is a matter between such person and Ball, and cannot affect the right of Ball to set up and insist upon a want or failure of consideration for his promise. The fact that McHugh got the goods did not make them of any more value than they would have been if Ball had got them. Any other rule would lead to results, in this and every similar case, which could not be tolerated. Ball would in this case have to pay for goods that neither he nor McHugh ever got, in direct violation of the written agreement of the parties to the contract; and as McHugh is, apparently, insolvent, Ball would have no remedy against any one by which he could be reimbursed. We are quite clear that Ball can, in this case, set up the want or failure of the consideration of the note given by him under the agreement, and of the agreement to which he is a party. As the evidence showed that the goods amounted to much less than the sixteen thousand dollars in value, according to the invoice, the court committed an error in finding against Ball for the full amount of the note and contract.

We may remark that there seems to be some mistake in the record, the court's finding being for two thousand five hundred dollars on the note, and the judgment for three thousand six hundred and twenty-two dollars and fifty cents. The question as to the order of the court for the sale of the equitable title to the Ohio town property is probably not properly before us, for the reason that the point was not made in the common pleas. But we need not decide this.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellant.

J. T. Dye and A. C. Harris, for appellee.

Britton *v.* Fox *et al.*

BRITTON *v.* FOX ET AL.

APPEAL.—*Justice of the Peace.*—An appeal from the judgment of a justice of the peace has the effect to vacate the judgment, and brings the case into court for a re-trial, as if it had not been before tried. The appellate court is not a court of errors.

JUDGE.—*Oral Appointment.*—A judge cannot, because he is “weary,” orally authorize an attorney to receive the verdict of a jury. The fact that the counsel are present does not make the appointment effective.

APPEAL from the Steuben Circuit Court.

DOWNEY, J.—This action was commenced by the appellees against the appellant and one Ingersoll, before a justice of the peace, on a promissory note, made payable to Cheney and Nichols. There does not appear in the transcript of the justice of the peace any complaint other than the note itself. There is no indorsement of it to the plaintiffs shown. The cause was tried by jury, before the justice of the peace, and the jury returned a verdict, finding for the plaintiffs, but not assessing any damages, or ascertaining the amount due on the note. The defendant Rachel Britton appealed to the circuit court, the other defendant having pleaded infancy, and no further notice of him appears to have been taken.

In the circuit court, Mrs. Britton moved the court to set aside the judgment of the justice of the peace, and to order the judgment rendered by the justice to be stricken out and set aside, and for judgment for costs. This motion was overruled. We think this motion was properly overruled. The appeal from the judgment of the justice of the peace had the effect to vacate the judgment, and brought the case into the circuit court for re-trial, as if it had not been before tried. The circuit court does not act as a court of errors to review and correct the action of the justice of the peace in questions of law merely. In the circuit court there was a trial by jury, verdict for plaintiff, motion for a new trial overruled, and judgment for the plaintiff. It is alleged as error, that the circuit court improperly refused to grant a new trial on the motion of the defendant.

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The first reason for a new trial stated to the circuit court is, that when the cause was given to the jury, it was agreed that if they made a verdict during the night, it was to be sealed up and brought into court the next morning; that an unsealed verdict was brought into court in the night, and in the absence of the presiding judge, and delivered by the foreman to one of the attorneys for the plaintiff in this suit, without consent of the defendant or her counsel, and without any knowledge on her part, or of her counsel, that the verdict would be so received. The facts, as shown in the bill of exceptions with reference to this part of the case, are as follows: The case was tried by jury. The jury retired to deliberate on their verdict in the afternoon. After dark the judge obtained consent of counsel that if the jury did not agree upon their verdict before nine o'clock, and agreed after that time before the meeting of the court next morning, they might seal up their verdict and bring it into court next morning. The judge and the defendant's attorney then left the court room. About fifteen minutes before nine o'clock, the judge and defendant's attorney were notified that the jury had agreed, and came to the court room. The jury had not yet agreed. The judge, being weary, asked Glasgow, one of the attorneys for the plaintiffs, if he would receive the verdict, and he said he would, and the judge, not knowing that Glasgow was attorney for the plaintiff, he not having actively participated in the trial of the case, directed him to receive the verdict. The judge then left the court room, and did not return until the next morning. The counsel for the defendant was then present, but did not assent to this, and the judge says in the bill of exceptions that he is satisfied that his attention was not called to what took place, though he supposed at the time that it was assented to. Shortly after the judge left, the jury came into the court room with their bailiff, and took the jury seats. Glasgow took their verdict and read it. One of the jury said it was not correct. Glasgow then told them to correct it, which

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they did, and he then again read it to them, and they assented to it. Glasgow then discharged the jury.

We are of the opinion that this proceeding cannot be sustained. It cannot be allowed that the judge of a court can thus orally designate an attorney to hold the court in his absence for any purpose, and that such attorney can then perform any of the duties of the judge of such court. It is provided by statute that in certain specified cases the judge of a circuit court may appoint a competent person to hold his court, but the fact that the judge is "weary" does not authorize him to appoint some one else to take his place. 2 G. & H. 9, 10. There was no court at the time when the verdict was returned and the jury discharged. The fact that counsel for the defendant was present, or was not present, can make no difference. We are not at all disposed to encourage any such loose practice.

We cannot examine the other reason for a new trial, which is the insufficiency of the evidence, because the evidence is not all in the record.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

D. E. Palmer, for appellant.

MANLOVE, RECEIVER, *v.* BENDER.

MUTUAL INSURANCE COMPANY.—*Assessment.*—In an action to recover an assessment upon a premium note given to a mutual insurance company, it must be alleged in the complaint, and proved upon the trial, that the losses to be paid accrued during the membership of the defendant in the company.

APPEAL from the Vanderburg Common Pleas.

DOWNEY, J.—This action was brought by Manlove, as receiver of the Farmers and Merchants' Insurance Co., a

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mutual insurance company, against Bender, to recover on two premium notes executed by him to the company. The defendant answered by general denial and several special paragraphs. Issue was taken on the special paragraphs by general denial thereof. The issues were tried by a jury, and there was a verdict for the defendant. The plaintiff moved the court for a new trial, for these reasons: first, because the verdict is contrary to the evidence; second, because the verdict is not sustained by sufficient evidence; third, because the verdict is contrary to law; fourth, fifth, and sixth, because the court overruled the demurrers to the second, third, and fourth paragraphs of the defendant's answer, respectively.

This motion was overruled, and final judgment for the defendant was rendered on the verdict of the jury.

The only error assigned in this court is the refusal of the court to grant a new trial. The first, second, and third reasons assigned for a new trial may be considered together. We have examined the evidence as set out in the bill of exceptions, and are of the opinion that the verdict was right. The evidence, among other things, fails to show that the losses to be paid occurred during the time of the membership of the defendant in the company. See *Manlove v. Naw*, *ante*, p. 289. This fact must be alleged and proved, in order to render the maker of the premium note liable to an action for the assessment. The fourth, fifth, and sixth causes for a new trial are not reasons for which a new trial can be granted, and no question is presented to us relating to the sufficiency or insufficiency of the paragraphs of the answer by such a mode of making up the record and assigning errors.

The judgment below is affirmed, with costs.

PETTIT, J., dissents.

F. R. Troxell, W. R. Manlove, and R. A. Hill, for appellant.

C. Denby and D. B. Kumler, for appellee.

The City of Indianapolis *v.* Bly.

THE CITY OF INDIANAPOLIS *v.* BLY.

CONTRACT.—Termination by Notice.—Damages.—Suit against a city for damages for violating a contract employing the plaintiff for one year to light the street lamps, and authorizing the defendant to terminate the contract by giving one month's notice in writing. The contract was terminated by the defendant without such written notice.

Held, that the following charge was correctly given : “It is of the contract between plaintiff and defendant that the defendant should have the right to declare the contract at an end after giving the plaintiff one month's notice in writing of such fact; and it is for you to find from the evidence whether such notice was given; then, after one month from the time when such notice was given, the defendant was no longer liable to plaintiff. But if such notice was not given, then the plaintiff is entitled to such damages as necessarily resulted from the refusal, if any, of the defendant to allow plaintiff to fulfil his contract in lighting the lamps, which may be for such loss as the plaintiff actually suffered by being thrown out of employment during the time, or any part thereof, he was employed under the contract. Such notice must have been given by the city. A notice by a councilman, without authority of the common council, is not such notice. But a notice given by the city clerk, thereunto ordered by the common council, is sufficient.”

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellant upon a contract by which the city employed the appellee as lamplighter for the period of one year from the first day of March, 1868. The contract, among other stipulations, provided: “And should the party of the first part fail or neglect to comply with any of the above stipulations embodied in the above agreement, it shall be lawful for the common council to declare this contract forfeited, or take any steps they may deem best to complete, or have completed any such work; and the expenses incurred by same, together with proper compensation for the trouble, shall be deducted from any moneys due such party of the first part; or, if no moneys remain in the hands of the party of the first part, then the security or securities given by the party of the first part shall be liable for the same. The party of the first part further agrees that the party of the second part shall have the right to declare this contract at an end, after giving the party of the first part one month's notice in writing of such fact.”

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No question is made upon the pleadings. There was a trial by jury, and a verdict for the plaintiff, assessing his damages at three hundred and thirty dollars. The defendant moved for a new trial, for the following reasons: "first, the verdict is not sustained by sufficient evidence; second, the verdict is contrary to law; third, because the court erred in the instructions to the jury, which were excepted to at the time; fourth, the damages are excessive.

The court overruled this motion and rendered judgment for the amount found by the verdict. The exception and assignment of errors present for our consideration the correctness of this ruling of the court. The question is before us on the evidence. It is not claimed by the city that Bly failed to perform the contract on his part, and that it, for this reason, terminated the contract. Nor is it claimed that the contract was terminated by the city by giving Bly one month's notice. We think the evidence shows that the city authorities terminated the contract for the reason that they had made or could make a contract with other parties more advantageous, or supposed to be more advantageous, to the city, without governing themselves by the stipulations of the contract giving them the right to put an end to it, and that the city is liable in damages for such unauthorized abrogation of the contract.

Objection is made by the appellant to the following instruction given by the court to the jury at the request of the plaintiff.

"It is of the contract between plaintiff and defendant that the defendant should have the right to declare the contract at an end after giving the plaintiff one month's notice in writing of such fact; and it is for you to find from the evidence whether such notice was given, then, after one month from the time when such notice was given, the defendant was no longer liable to plaintiff. But if such notice was not given, then the plaintiff is entitled to such damages as necessarily resulted from the refusal, if any, of the defendant to allow plaintiff to fulfil his contract in lighting the lamps,

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which may be for such loss as the plaintiff actually suffered by being thrown out of employment, during the time, or any part thereof, he was employed under the contract. Such notice must have been given by the city. A notice by a councilman, without authority of the common council, is not such notice. But a notice given by the city clerk, thereunto ordered by the common council, is sufficient."

The objection to the charge is thus stated by counsel for the appellant: "We submit that this instruction was calculated to, and probably did, mislead the jury, by inducing them, if they found for the plaintiff, to find for the plaintiff the full amount he would have been entitled to if he had lighted the lamps the entire year, thus leading the minds of the jury away from the evidence on the true question of the damages really sustained by the plaintiff, as shown by the evidence.

We think there is no ground for this objection to the charge. It is evident that the jury did not allow compensation for the whole year. The number of lamps was eight hundred and fifty-six, and at twenty cents per month each, the price agreed upon, the amount would, for the entire year, have been over two thousand dollars. But the amount of damages given by the jury was only three hundred and thirty dollars. We see no objection to the instructions. There is another instruction given which it is said should not have been given, but counsel for the appellant admit that it was immaterial, and it could not therefore have done any harm. We think the motion for a new trial was properly overruled.

The judgment is affirmed, with costs.

F. S. Harvey, for appellant.

*G. H. Voss, B. F. Davis, F. A. Holman, and W. S. Ray,
for appellee.*

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39	876
134	15
39	876
138	549
139	195

PROMISSORY NOTE.—*Indorser.*—Evidence.—Where one not a party to a note places his name on the back thereof, before, or concurrently with, the indorsement by the payee, he is liable as indorser, but his actual relation to the maker and payee, as between themselves, may be shown by parol evidence, though not so as to affect the rights of the holder.

SAME.—*Issue Between Parties to Promissory Note.—Practice.—New Trial.*—The rights of parties liable on a promissory note may be settled, as between themselves, in an action against them by the holder of the note, and a new trial may be granted upon this issue; but the plaintiff in the action on the note will not be delayed thereby, but may proceed to collect his judgment against the parties liable to him.

EVIDENCE.—*Cumulative.—New Trial.*—Evidence which goes to the same point, but is different in kind, is not merely cumulative, and may entitle a party to a new trial on the ground of newly-discovered evidence.

APPEAL from the Fayette Common Pleas.

WORDEN, J.—This was a complaint by the appellant against the appellees for a new trial. Demurrer to complaint filed by Bruner, for want of sufficient facts. Sustained, and exception. Final judgment for defendants for costs.

The material facts alleged in the complaint are the following: That the defendants, Emmet P. Houston and Augustus N. Bruner, were partners in the business of buying grain and the manufacture and sale of flour, and, for the purpose of carrying on their said business, they had occasion to borrow money, to enable them to do which, they solicited the plaintiff to become their indorser, to which he consented; that accordingly two several notes were prepared, at different times, each for the sum of one thousand dollars, signed by the defendant Bruner as maker, payable at the Bank of Brookville, to the order of the plaintiff herein, W. H. Houston, and indorsed on the back thereof by the defendant Emmet P. Houston. One of the notes bore date July 27th, 1869, and the other August 11th, 1869. The notes thus prepared were indorsed by the plaintiff herein to the bank, the defendants, Bruner and Emmet P. Houston, receiving the entire proceeds, and the bank, at the times of the several transactions, having notice of all the facts. The

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bank sued all the parties to the notes, viz., Bruner and the two Houstons, and had judgment against all. Issues were joined and the question raised which will be hereafter noticed. This is the cause in which a new trial is asked. We do not discover from the averments in the complaint herein that any question was made as to the right of the bank to recover a joint judgment against all the parties. But in that suit, the defendant Bruner, by way of answer and cross complaint therein, alleged that he executed the notes as surety for the plaintiff herein and the said Emmet P. Houston, to which the plaintiff herein replied by denial. And the plaintiff herein answered, by way of cross complaint, that he was only an accommodation indorser and surety for said Bruner and Emmet P. Houston, and to this Bruner replied by denial. These issues, together with the others in the cause, were submitted to the court for trial.

The bank, to make out her case, introduced the notes and protests and rested.

Bruner, to support his allegations, testified that he and the plaintiff herein were partners in the business mentioned, and that said Emmet P. Houston was not a partner; that the agreement of partnership was made at the house of the plaintiff herein, in the month of July, 1869, in the presence of Emmet P. Houston; that he signed the notes as drawer on Emmet P. Houston, and William H. Houston, this plaintiff, became the indorser, as appears on the back of the notes; that the notes were so executed by the direction of this plaintiff, William H. Houston, who agreed to furnish all the money to run the mill; the notes were executed to raise money to run the mill with; that the mill was to be run by the witness, Bruner, and the plaintiff herein, as equal partners; that he, Bruner, signed the notes as security for the Houstons. He also introduced as a witness one — Yeager, who testified that he was the miller of Bruner during the summer and fall of 1869, during which time William H. Houston frequently called at the mill and seemed to take a deep interest

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in it, and asked how the mill was paying; said he had an interest in it, but did not say what it was.

Said Augustus N. Bruner introduced —— Bruner, who testified that he was the brother of Augustus N.; was one of the millers for his brother in summer and fall of 1869, during which time he frequently saw William H. Houston at the mill; he seemed to take an interest in the mill; never knew him to buy any wheat for the mill, or sell any flour manufactured at the mill, or use the firm name.

He also introduced James Elliott, who testified that, in the fall of 1869, he went to the store of Emmet P. Houston, in Alpine, Fayette county, Indiana, in company with William H. Houston; went to the store for the purpose of purchasing an interest in it and examining the stock; in a conversation with William H. Houston at the store on this occasion, "he told me, as I understood him, that he had an interest in the mill, but did not say what it was."

This was all the evidence given by Bruner in support of the issues.

Thereupon, the plaintiff herein, on his own behalf, testified, that a short time before the execution of the first note, Bruner and Emmet P. Houston came to his house, and each of them, in the presence of each other, stated to the plaintiff herein that they had entered into partnership to buy and sell wheat, and manufacture and sell flour, at the town of Alpine, where they then resided, and that they wanted to borrow fifteen hundred or two thousand dollars for the purpose of conducting the business; plaintiff told them he had no money to loan, but that he would indorse for them, if they could raise the money in that way; that he thought the money might be procured at Brookville; they requested him to go to Brookville and see if the money could be procured; plaintiff agreed to do so, and in a few days afterward went to Brookville and made the arrangement for the money with the bank, and immediately informed them of the arrangement he had made for them; when he made the arrangement for the money, he told Mr. Hitt, the cashier of the

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bank, that he was to indorse for them, and that one thousand dollars would be as much as they would need for a few days; Mr. Hitt then filled up the note, dated July 27th, 1869, as the same appears, which, on his return, he delivered to them, and they signed the same, as their names appear on the note; this was at the store of Emmet P. Houston, in the town of Alpine; after they had signed it, it was handed back to witness, who indorsed his name on the back of it; they then requested him to go to the bank and get the money, as he had a pass over the railroad and they had not; witness did so the next day, and returned to them the amount received from the bank; when they wanted the money for the second note, they called on witness at the store, and he indorsed it at their request as their security, and they negotiated it at the bank on the arrangement he had made at the bank as before stated; witness was not a partner with Bruner; had no interest in the business of the firm; the firm was composed of Augustus N. Bruner and Emmet P. Houston; they were partners alone; witness never bought any wheat, or sold any wheat or flour, for the firm; never used the name of the firm; never used any of the money obtained on the notes sued on; simply indorsed the notes as accommodation indorser for Bruner and Emmet P. Houston, which was known to the bank at the time she discounted the notes; Emmet P. is the son of the witness.

Plaintiff also introduced as a witness Emmet P. Houston, who testified substantially to the same facts as said plaintiff.

Plaintiff also introduced as a witness John R. H. Penny, who testified that he was acquainted with Augustus N. Bruner, Emmet P. Houston, and the plaintiff herein; lived in the town of Alpine in the summer of 1869; some time during that summer, Bruner and Emmet P. Houston called on witness to write a contract of partnership between them in the business of buying and selling grain and running the mill, and stated to him the terms of their agreement; the witness afterward drew up the agreement and gave it to Bruner, who, on reading it, took some exceptions to it;

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agreement was left with Bruner, and witness has not seen it since; at that time, Bruner and Emmet P. Houston were engaged in the business of buying and selling wheat and running the mill, and they continued the business for some time afterward; witness occasionally bought grain for them during this time; never knew of William H. Houston having any interest in the firm, or transacting business for them.

This was all the evidence given in the cause. There was some further evidence offered by the plaintiff herein, but rejected. As no exception appears to have been taken to the rejection of the evidence, it need not be further noticed.

Upon this evidence, the court found for the plaintiff in the original action, the Brookville National Bank, against all the defendants therein, and ordered that the amount be first levied of the property of Emmet P. Houston, and if he had not sufficient, etc., then of the property of the plaintiff herein, and after the exhaustion thereof, then the residue to be levied and collected of the property of said Augustus N. Bruner. The finding and judgment of the court were rendered on the evening of the 24th of December, 1869, and immediately before the adjournment.

That after the rendition of the judgment, and before the close of the term, the plaintiff, for the first time, discovered that he could prove by one William Kerr, a competent witness, that he, said Kerr, was present and heard the conversation between this plaintiff and James Elliott at the store of Emmet P. Houston, and testified to by James Elliott, and that in said conversation this plaintiff told said Elliott that he had no interest in the mill, but did tell said Elliott that Emmet P. Houston had a half interest in said mill, and that the mill was then being run by Augustus N. Bruner and Emmet P. Houston. And also, after the rendition of the judgment and before the close of the term, the plaintiff, for the first time, ascertained that he could prove by one Augustus H. Wood, a competent witness, that about the 1st of December, 1869, the witness had a conversation with the defendant Bruner, in which conversation the defendant

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Bruner said that his mill was closed up by attachment at the suit of the Brookville National Bank; that he and Emmet P. Houston were indebted to said bank on two notes, and that the plaintiff, William H. Houston, was their indorser on each of said notes, and that this plaintiff had caused the attachment suit to be commenced, in order to save himself as such indorser. Each of said witnesses resides in Connerville, in said county.

That previous to the rendition of the judgment, the plaintiff had no knowledge, information, or belief that either of said witnesses knew the facts, and would testify as above stated; that immediately upon ascertaining said facts, to wit, on the evening of the 24th of December, 1869, he informed his counsel thereof, and then and there in said court, in writing, moved said court for a new trial in said cause, and time was given to procure the affidavits of said witnesses and the affidavit of this plaintiff in support of said motion. The motion for a new trial embraced, as one of the causes, newly-discovered evidence.

It is further alleged, that upon the morning of the 25th of December, 1869, and before the plaintiff could procure the affidavits of the witnesses and his own affidavit in support of his motion, the court closed its term and adjourned, leaving the motion undetermined until the next term of the court; that subsequent to the December term, 1869, of said court, the plaintiff has ascertained that he can prove by John R. H. Penny, that about the 27th of August, 1869, said Penny had a conversation with the defendant Bruner, in which the latter stated to the witness that he, Bruner, and the defendant, Emmet P. Houston, had given two notes to the Brookville National Bank, and that this plaintiff, William H. Houston, was their surety or indorser on each of said notes. And also, after the close of said term, the plaintiff, for the first time, ascertained that he could prove by John W. Hitt, that in a conversation between Hitt and the defendant Bruner, subsequent to the making of the notes and before the commencement of the suit thereon, Bruner stated

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to the witness that he, Bruner, and Emmet P. Houston were partners.

The complaint alleges that the bank has issued an execution upon her judgment, and that the sheriff, Miller, is about to seize property of the plaintiff to satisfy the same.

It is further averred that as soon as the plaintiff ascertained that the defendant Bruner claimed to be a surety on the notes for the plaintiff, he made diligent inquiry to ascertain the statements of Bruner to the contrary, but was unable to discover the newly-discovered evidence until the times herein stated.

Prayer, that the judgment be set aside and a new trial granted, etc. The affidavits of the several witnesses were filed as part of the complaint.

This suit was commenced on the 11th of March, 1870, and before the next term of the court after the judgment was rendered.

The question arises, whether the demurrer was properly sustained to the complaint; in other words, whether the plaintiff herein, on the facts stated, was entitled to a new trial.

As between the original plaintiff and defendants there is no ground for a new trial. It is alleged that, at the time the bank discounted the notes, she had notice of the relations of the parties to the paper. Such notice does not affect her right to recover against all the parties. We have seen that the notes were signed by Bruner as maker, and that made him liable as such. They were payable to the order of the plaintiff herein, and he indorsed them to the bank, whereby he became liable as indorser.

Before or concurrently with the indorsement of the notes by the payee, Emmet P. Houston placed his name on the back of the notes, and this made him liable as maker or indorser. We think the better opinion is that his liability was that of an indorser. *Vore v. Hurst*, 13 Ind. 551. The notes were dishonored, and protested for non-payment, and due notice given, as well to Emmet P. Houston as to the plaintiff

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herein, William H. Houston. Thus the liability of the indorsers became fixed. The bank could have sued either the maker or indorsers at her option; and their rights as between themselves could not have, in any way, affected the bank as holder.

The bank, having a complete right of action against the indorsers as well as the maker, was authorized by statute to bring a joint action against all. 1 G. & H. 451, sec. 16; 2 G. & H. 50, sec. 20.

But the defendants in the original action had the right, as between themselves, to make up and try an issue as to whether some were principals and others sureties, but these proceedings, it is expressly provided, shall not affect the proceedings of the plaintiff. 2 G. & H. 308, sec. 674. This statute is as applicable to cases arising on bills of exchange and promissory notes, as those arising upon other contracts; and while parol evidence cannot be admitted to change the legal effect of the instrument according to its tenor and the relations of the parties to it, so as to affect thereby the rights of the holder, yet such evidence is admissible, as between the parties bound by the instrument, to show the real facts, and that their relations, as between themselves, are different from what they appear to be on the face of the paper. *Lacy v. Lofton*, 26 Ind. 324.

Such issue was made up and tried in the cause in which a new trial is sought; and the question is fairly presented whether the plaintiff herein, on the showing he has made in his complaint, is entitled to a new trial of that issue. He has set out the evidence given on the trial of that issue, and we may remark, although we have not had the benefit of hearing the witnesses testify and observing their manner, that the evidence on paper preponderates against the finding below. It seems to us that the newly-discovered evidence would most likely produce a finding or verdict the other way. It seems to us also that due diligence is sufficiently alleged to discover the evidence, and that the plaintiff herein is not in default in that respect.

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The newly-discovered evidence is not liable to the objection that it is cumulative merely. "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances, tending to establish the fact, is not." 1 Greenl. Ev., sec. 2; *Humphries v. The Administrators of Marshall*, 12 Ind. 609. Tested by this rule it is apparent that the newly-discovered evidence was not merely cumulative. It went to the same point, but was different in kind.

We are of opinion that, on the facts alleged, the plaintiff herein was entitled to a new trial of the issues on the subject of suretyship, and that the demurrer of Bruner should have been overruled. It follows that the judgment will have to be reversed.

This ruling, however, will not affect the plaintiff in the original judgment, who can proceed in the collection thereof; and the defendants in the original action can proceed, as they may be advised, to settle their respective rights as between themselves.

The judgment below is reversed, at the costs of the appellee Bruner, and the court below directed to proceed in accordance with this opinion.

B. F. Davis and B. F. Love, for appellant.

F. C. McIntosh and B. F. Claypool, for appellees.

STUTSMAN v. THOMAS.

ESTOPPEL.—Pleading.—Promissory Note.—In a suit by the assignee of a promissory note, negotiable under the statute, against the maker, where the answer was want of consideration, there was a reply that after the purchase of the note, it was shown to defendant, who stated that it had been altered; that

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plaintiff thereupon told defendant that if it had been so altered, the assignor had committed a fraud upon the plaintiff, and that he would proceed at once to procure a rescission of said contract of assignment; that the assignor was then in the same town, but resided in New York; that the maker requested delay and promised to see the assignor, and did so see him, and, returning, informed the plaintiff that the matter was satisfactorily arranged, and he would pay the note, and therefore the plaintiff did not rescind said contract; wherefore the defendant was estopped from denying his liability.

Held, that the reply was bad, as it alleged no damage to the plaintiff by reason of the promise.

SAME.—Evidence.—Such promise might be given in evidence on the trial, but could not operate as an equitable estoppel.

APPEAL from the Elkhart Common Pleas.

DOWNEY, J.—The appellee sued the appellant. The complaint has two paragraphs. The first is upon a promissory note for fifty dollars, executed by the defendant to one John H. Vanness, and indorsed by him to the plaintiff; and the second is upon a promissory note for thirty dollars, made by the defendant to W. A. Thomas & Co., and by them indorsed to the plaintiff. No question is made as to the note set out in the second paragraph of the complaint. The second paragraph of the answer was addressed to the first paragraph of the complaint, and alleged that the note therein mentioned was executed without any consideration whatever. The third paragraph, which is also to the first paragraph of the complaint, alleges that the note set up in that paragraph was given in consideration that the payee thereof would convey to the defendant and others the right to use and vend H. R. and M. T. Barnes' patent improvement for sinking tube wells in and for Concord township, Elkhart county, in the State of Indiana, and that the payee thereof would cause to be sunk and made one of the said wells for the said parties, and put the same in good working order, this defendant paying for the pipes, and for no other consideration whatever; that at the time of the execution of said note, and as an inducement thereto, the payee of the same represented and warranted to this defendant that the said H. R. and M. T. Barnes' improvement, which he was then

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offering to sell, had been patented by the proper authorities; that it was a new and useful improvement, and that he was authorized to sell the same; that upon sinking the same to the proper depth, it would continue a good and lasting well, and would never pump or draw sand; and then and there agreed, in writing on the back of said note, that if it did not so operate, and if his said statements were not true, the said note should be void; which writing has been destroyed, without the consent of the defendant; when in truth and in fact no patent was ever issued upon the said pretended improvement, and the same was not new and useful, but was then and there of no value whatever, and upon the tube being sunk to the proper depth, it would not constitute a well of any value, but would continually draw sand, and the said payee then and there had no authority to sell and convey the same whatever, and never did so sell and convey the same, and never did so sink and construct the said well; all of which the said payee then and there well knew. In the fourth paragraph of the answer, the defendant says he denies that he executed the note in said first paragraph of the complaint mentioned as therein described, and as it now exists; and although he says the signature thereto attached is his signature, he says that at the time it was affixed to the said note, and at the time it was executed, it contained on the back thereof, and which composed a part of the said note, a written contract, signed by the payee of the said note, in substance, that if the patent right which was the consideration for the said note did not work successfully and give good satisfaction and perform as represented, the said note should be void; that since the execution of the said note, the same has been altered and changed by the removing and destroying of the said contract on the back of the said note. This paragraph of the answer was verified by the oath of the defendant.

To the second and third paragraphs of the answer, the plaintiff replied, first, the general denial; second, he admits that the note was executed in consideration of a certain in-

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terest in the patent right in the answer mentioned, which the said defendant purchased, in connection with Samuel Stutsman, Daniel Shupert, Levi Stutsman, George Boop, and Daniel Lutz, and that said persons, in connection with the defendant, purchased the right to use the same jointly, but the plaintiff says that the defendant is estopped from setting up the matters and things in the said paragraphs mentioned, for the following reasons, to wit: that the plaintiff, a few days after the said note was transferred to him, and whilst the assignor was yet in the town of Goshen, saw the defendant and notified him of the assignment of the said note to him and showed the same to him, and asked him whether the said note was valid and right, and also told the said defendant that if he had any valid defence to said note, to make the same known to him then, before the assignor left the town, so that the said contract of assignment might be rescinded by the plaintiff, as the said assignor had represented the said note as being all right and valid to the plaintiff before and at the time of the assignment, and had guaranteed the consideration to be good and valid, and promised to take the same back and return the money paid for the same to plaintiff, if objection thereto was made by the defendant, and the plaintiff says that the defendant, at the time of the notice before named, told the plaintiff that he would not say the said note was all right until he had seen the said assignor; that after a short period of absence from the place above named, where the above conversation was had, the defendant returned to this plaintiff's place of business, and said to him that the note was all right, and that he and the assignor had fixed it up, and that this plaintiff should keep the said note, and not rescind the said contract of assignment, that he would pay the note when it became due; and the plaintiff says that at the time of the conversation above recited, the said assignor was in the town of Goshen, in Elkhart county, and that had it not been for the fact that the defendant informed him after consultation with the assignor that the said note was all right and would be paid, he

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could and would have then and there procured a rescission of the said contract of assignment, and received back the consideration which he paid for said note, but by reason of the conduct of the defendant, he took no steps to procure a rescission of the said contract; that the said assignor is now a non-resident of the State of Indiana, and is believed to reside in the State of New York; wherefore, etc.

The third paragraph is the same, in substance, as the second, but in addition, it alleges that after the first conversation between the plaintiff and defendant about the note, the defendant received of the assignor property of the value of five dollars, in consideration of which he returned to the plaintiff, and said that the matter with reference to the note was fixed up, that it was all right, and promised that he would pay it.

In the fourth paragraph, it is alleged that the defendant is estopped to set up the defence, because that ever since the purchase of the said right to use and vend the said patent mentioned, in the place mentioned, the defendant has used and sold said patent in said township, and is still using and selling the same as the patent of the said H. R. and M. T. Barnes; that in the use and sale of said patent he has made a profit of five hundred dollars and more, which he retains, and also retains and uses the said patent right; wherefore, etc.

To the fourth paragraph of the answer, the plaintiff replied, first, the general denial; and, second, that the defendant is estopped from alleging the defence in said fourth paragraph set up, for the reason that after the said note came into the possession of the said plaintiff, the same was shown to the defendant, and he had full and complete inspection thereof; that after he inspected the same in the presence of the plaintiff, he made some objection to the same on the ground of an alleged alteration thereof, and said that the same had been altered; that this plaintiff then told the said defendant that if it had been altered, the said assignor had committed a fraud upon him, and had laid himself liable to

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a criminal prosecution for fraudulently altering and passing said note, and that he could and would proceed at once to procure a rescission of his contract of assignment; that the said assignor was then in the town of Goshen; that his place of residence was in the State of New York, which the defendant well knew, and proposed starting at once to secure a rescission of said contract. The paragraph then proceeds to allege, as the second paragraph of the reply to the second and third paragraphs of the answer, that the defendant saw the assignor, and on returning to the plaintiff said the matter was arranged, and he would pay the note, etc.

Demurrs to the second, third, and fourth paragraphs of the reply to the second and third paragraphs of the answer, and also to the second paragraph of the reply to the fourth paragraph of the answer, for the reason that they did not state facts sufficient to constitute a reply, were filed by the defendant. The demurrer to the fourth paragraph was sustained, and the others overruled, by the court, and the defendant excepted. A trial by jury resulted in a verdict for the plaintiff. A motion was made by the defendant for a new trial, which was overruled, and judgment was rendered for the amount of the verdict.

The errors assigned, which raise any questions, are as follows:

First. That the court erred in overruling the demurrer of the defendant to the second paragraph of the plaintiff's reply to the second and third paragraphs of the defendant's answer to the first paragraph of the complaint.

Second. That the court erred in overruling the defendant's demurrer to the third paragraph of the plaintiff's reply to the second and third paragraphs of the said answer.

Third. Overruling the defendant's motion to strike out a portion of the third paragraph of the plaintiff's reply to the second and third paragraphs of said answer.

Fourth. In overruling the defendant's demurrer to the second paragraph of the plaintiff's reply to the fourth paragraph of the answer.

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The fifth relates to the challenge of a juror, and the sixth to the exclusion of evidence, matters which should be embraced in the motion for a new trial, in order to be properly presented to this court.

Seventh. Overruling the defendant's motion for a new trial.

We think the same question, substantially, is presented by the first, second, and fourth assignments of error. That question is, whether or not the matters set up in the paragraphs of the reply are such as show that the defendant is estopped to set up the matters stated in his answer, as a defence or as defences to the note on which the first paragraph of the answer is predicated. If the maker of a note, by himself or his agent, represent to a person about to take an assignment of the note that the note is valid, and that he has no defence to it, he will be estopped to plead a failure of consideration to a suit on the note by such assignee. *Vanderpool v. Brake*, 28 Ind. 130; *McCabe v. Raney*, 32 Ind. 309. There are many other cases to this effect in this court.

On the other hand, it is equally well settled that such statements or admissions made by the maker of the note to the assignee or indorsee, after he has become the owner of the note by assignment or indorsement, will not estop the maker to set up his defences to the note. *Patrick v. Jones*, 21 Ind. 249; *Ray v. McMurtry*, 20 Ind. 307; *Jones v. Dorr*, 19 Ind. 384. There are probably other cases to the same effect in this court.

But it is sought to exempt the case under consideration from the operation of the rule laid down in these last cases, by stating in the replies that the assignor of the note was at Goshen, in this State; that the assignee went to the defendant and told him this, and also that if he had any defence against the note, he would go to the assignor and rescind the contract by which he had acquired the note, and that the maker of the note, after having seen and communicated with assignor, returned and said that the matter was arranged be-

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tween him and the assignor of the note, and that he would pay the note; that the appellee, in consequence of this statement, did not take any steps to rescind the contract.

It is not alleged in any of the paragraphs of the reply that by the contract between the appellee and Vanness, the appellee had a right, in case of an objection by the maker to the payment of the note, to rescind the contract of assignment. It is true that one or more of them alleges that the appellee told the appellant in the conversation which they are alleged to have had about the note, that he had such right. Possibly, however, this does not make any very material difference, as the assignee of a promissory note, given without any consideration, may sue the assignor at any time, and without having previously sued the maker. *Fosdick v. Starbuck*, 4 Blackf. 417; *Howell v. Wilson*, 2 Blackf. 418.

It is not alleged in the paragraph of the reply that the appellee was about to commence legal proceedings against the assignor at Goshen, that he informed the appellant of this fact, and that in consequence of anything said or done by the appellant, the appellee refrained from instituting such legal proceedings, and thereby lost the legal remedy against the assignor by suit in this State. Nor is it alleged that there was any loss to the appellee by or in consequence of any delay or postponement of his remedy or action against the assignor. In every well considered case where the doctrine of equitable estoppel has been laid down and applied, the element of damage or loss to the party setting up the estoppel has been mentioned as an essential one. If he would suffer no damage by allowing the party to retract his statement, it has never been held that there was any estoppel. Thus in *Ridgway v. Morrison*, 28 Ind. 201, it is said: "As a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of the latter." That this is an essential element in a valid and binding estoppel, see 2 Smith Lead. Cas. 642, *et seq.*, and cases there

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cited. All that we learn from the paragraphs of the reply is, that in consequence of the acts and statements of the appellant, the appellee did not go to Vanness and rescind the contract by which the note had been assigned to him. It is not alleged that the assignor immediately left Goshen for New York, or if he did so leave, that he did not return the next week, or at some other time, or that the appellee could not at any time, or cannot now, rescind the contract with him. It is not shown that the contract could not have been rescinded without the presence of Vanness at Goshen, as well as with it. It is not stated that Vanness has become or is insolvent. In short, it is not shown that the appellee has been injured by the statements made by the appellant to him, or that he will suffer any damage or injury by allowing him to contradict them by setting up and insisting upon his proposed defences. The appellee claims that, in consequence of the statements made to him, he omitted to do that which otherwise he would have done, that is, rescind the contract; but he does not show that he has been or will be injured by his omission to act. In our opinion, the court erred in overruling the demurrsers to the paragraphs of the reply in question. Of course, the statements of the appellant may be used in evidence against him, but we do not see that he ought to be concluded by them by applying to them the doctrine of estoppel.

The other points presented by the assignment of errors need not be considered by us, as the judgment must be reversed for the reason given.

The judgment is reversed with costs, and the cause remanded, with instructions to sustain the demurrsers to the replies, and for further proceedings.

A. S. Blake and R. M. Johnson, for appellant.

F. A. S. Mitchell and F. H. Baker, for appellee.

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HARLAN v. WATSON ET AL.

SUPREME COURT.—*Notice.*—Where notice is not given to co-parties not joining in an appeal to the Supreme Court, as required by section 551 of the code, the appeal will be dismissed.

SAME—Parties.—*Guardian ad Litem.*—A guardian *ad litem* cannot appeal to the Supreme Court in his own name.

APPEAL from the Tipton Circuit Court.

DOWNEY, J.—This action was commenced by the appellees against Joshua K. Harlan, Sr., Arttissa Harlan, Joshua K. Harlan, Jr., John O. Harlan, Rosa B. Harlan, and Josiah M. Clark, to set aside certain conveyances as made to defraud creditors. There was judgment against the defendants. Part of them appeal, and the assignment of errors is by Arttissa Harlan alone, in her own behalf and as guardian *ad litem* for Joshua K. Harlan, Jr., John C. Harlan, and Rosa B. Harlan.

We think the appeal will have to be dismissed. A guardian *ad litem* cannot appeal in his or her own name. But in addition to this there is no appeal by the other defendants, nor is any notice served on them; as required by 2 G. & H. 270, sec. 551; and see *Kirby v. Holmes*, 6 Ind. 33.

The appeal is dismissed, with costs.

D. Moss and N. R. Overman, for appellant.

J. W. Robinson, J. Green, and D. Waugh, for appellees.



THE LOUISVILLE, NEW ALBANY, AND ST. LOUIS AIR LINE R. W. CO. v. DRYDEN.

RAILROAD.—Appropriation of Real Estate.—Appraisers.—Qualification of Jurors.—The first appraisers appointed under section 15 of the railroad act (1 G. & H. 509, 510) must be freeholders; and if the court, upon exceptions, order a new appraisement, the appraisers must possess the same qualification; but if either of the parties excepting to the first appraisement insists upon a jury trial, the jurors need only be reputable householders. It is otherwise, if the proceedings are under the act relating to the writ for the assessment of damages.

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PRACTICE.—*Number of Witnesses.—Taxation of Costs.*—On an appeal to the Supreme Court, it will not examine the general bill of exceptions and compare the statements of the witnesses, to determine whether more than three witnesses testified to the same fact, in order to decide a question of the taxation of costs.

SAME.—*Summons for Witnesses.—Costs.*—On a motion to tax costs, it cannot be held that more than one summons cannot be issued, for witnesses of the same party, to the same county, at the same term of the court.

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—This was a proceeding for the appropriation of certain real estate of the appellee by the appellant for its railroad track, under section 15, p. 509, I G. & H. Upon the filing and presentation of the proper instrument of appropriation, the judge of the circuit court appointed appraisers, who assessed the damages and made their report to the clerk of the court. Within ten days, the appellee filed exceptions to the award of the appraisers; all of which exceptions were stricken out except the fourth, which is :

“Because the damages awarded by the said appraisers, for the property attempted to be appropriated by said railway company, are inadequate, and not commensurate with the damages which will be sustained by defendant by the appropriation.”

Upon this exception there was a trial by jury, and a verdict for the appellee for an increased amount.

The plaintiff moved the court for a new trial, which was overruled, and exception taken. The court then rendered judgment for the appellee for the amount of the verdict.

The assignment of errors calls in question the correctness of the ruling of the court in refusing to grant a new trial, and in overruling, in part, a motion made by the plaintiff with reference to the taxation of the fees in the case of certain witnesses, and the expense of summoning them, and also the costs of issuing certain supernumerary writs of summons for witnesses, when the names of all the witnesses should, as alleged, have been included in one writ.

The reasons for a new trial are, first, excessive damages;

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second, that the verdict is not sustained by sufficient evidence; third, is contrary to law; fourth, because the court refused to allow it to be shown by the plaintiff, in impanelling the jury, that some of them were not freeholders, with a view of challenging them for that cause.

The first, second, and third reasons for a new trial are not insisted upon in the brief of counsel for appellant, and we think there is no reason for disturbing the judgment of the court on these grounds.

This court has decided, that in cases of this kind either party may demand and have a trial by jury, as a constitutional right. *The Lake Erie, Wabash, and St. Louis Railroad Co. v. Heath*, 9 Ind. 558. Must the jurors in such a case be freeholders? The appraisers, under section 15 of the act in regard to railroad companies, must be "disinterested freeholders of such county." The 708th section of the code of civil practice, relating to the proceeding formerly known as *ad quod damnum*, but by the code called the writ of assessment of damages, provides that the court, upon application, or the clerk in vacation, shall determine the number of jurors at not less than six nor more than twelve, who shall be disinterested freeholders, not owning land within one mile of any part of the public way for which the land is taken. Proceedings under this writ are expressly authorized in cases where any person, corporation, or company designs to construct a canal, or railroad, or turnpike, graded, macadamized, or plank road, or bridge, or establish a ferry, as a work of public utility, although for private profit, being authorized by law to take real property therefor. Sec. 706, p. 315, 2 G. & H.

It is contended by counsel for the appellant, that, under these provisions, juries in cases of this kind are required to be freeholders. We are referred to the case of *McMahon v. The Cincinnati and St. Louis Short-Line R. R. Co.*, 5 Ind. 413, which was a case where the damages had been assessed by appraisers under section fifteen, *supra*, and exceptions had been taken to the amount, as in this case, and the court, in speak-

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ing of the enactments in question, said, "These enactments were passed at the same session, relate to the same subject, and, in our opinion, are not directly repugnant to each other. They may, therefore, be taken in *pari materia*, and considered as one enactment. This being done, their construction is not difficult. Nor is the intention of the legislature left in doubt. The assessment of damages may be legally made by arbitrators appointed by the court under the first approved act, or by jurors selected in the mode prescribed by the latter statute; but no person owning land within one mile of the contemplated railroad is competent to act in either capacity, nor can a deduction be made for any benefits that may be supposed to result to the owner of land from the construction of the road."

We do not regard this decision as decisive of the question. It seems to proceed upon the supposition that when the proceeding is under section fifteen of the railroad act, and exceptions are taken to the report of the appraisers, the court must appoint other appraisers; and that as the first appraisers must be freeholders, etc., so must those appointed by the court upon exceptions taken. But, as we have seen, this court subsequently decided that the parties, or any one of them, might claim and have a trial by jury upon such exceptions, as a constitutional right.

The law now in force relating to the qualifications of jurors in the circuit court is found in 2 G. & H. 30. It requires only that the jurors shall be "reputable male householders." This act must govern, unless there is some law making the case under consideration an exception to the general rule which it creates. We are of the opinion that there is no such statute relating to this case. The first appraisers appointed under the fifteenth section of the railroad act must be freeholders; and so if the court, on exceptions taken to their report, shall order a new appraisement, it must be made by appraisers possessing the same qualifications. But if, instead of allowing such new appraisers to be appointed, the parties, or one of them, insist upon a trial by jury, we think

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the jurors need only possess the qualifications of jurors in ordinary cases, that is, be reputable householders.

If the proceeding to assess the damages be commenced under the act relating to the writ of assessment of damages, where the sheriff holds the inquisition, then the jurors must, by the express requirements of the statute, be freeholders, etc. We conclude that the court committed no error in its ruling upon this point.

The next question relates to the fees and the expenses of summoning certain witnesses. The plaintiff moved the court to tax such fees and expenses of all witnesses more than three summoned and examined by the defendant, the appellee, to him, on the ground that the fees, etc., of but three of the witnesses testifying to the same facts can be taxed against the plaintiff. The statute provides, that "if any party summon more than three witnesses to prove the same fact, he shall pay the costs occasioned by the additional number of witnesses." 2 G. & H. 167, sec. 231. We are asked to examine the testimony given by the witnesses as set out in the general bill of exceptions, to determine whether or not the witnesses testified to the same fact. The bill of exceptions presenting the point now under consideration does not show that the witnesses testified to the same fact. To present a point by exception, "the objection must be stated with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." 2 G. & H. 209, sec. 344. We cannot examine the general bill of exceptions and compare the statements of the witnesses for this purpose.

The last question presented is that relating to the costs of issuing an unnecessary number of writs of summons for the witnesses of the appellee. The statute on this subject provides, that "one summons shall include all the witnesses required at the same time, residing in the same county." 2 G. & H. 167, sec. 230. There is no evidence that any summons did not contain all the witnesses required at the same

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time. Without such evidence the action of the court must be held to be correct.

It is frequently the case that a party, after he has ordered a summons for all the witnesses whom he supposes it will be necessary for him to examine, discovers that there are others who can testify in his favor, or his adversary may have summoned witnesses whom he may want to impeach, or whose testimony he may find it necessary to meet and overcome. In such cases he must be allowed to order an additional summons for these witnesses. We think it cannot be held that one summons only can be issued for the witnesses of the same party, to the same county, at any term of the court.

The judgment is affirmed, with costs.

G. V. Howk and *W. W. Tuley*, for appellant.

D. C. Anthony, for appellee.

**THE LOUISVILLE, NEW ALBANY, AND ST. LOUIS AIR LINE
RAILWAY COMPANY v. DUVALL.**

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—The questions presented in this case are the same as the questions in the case of *The Louisville, New Albany, and St. Louis Air Line R. W. Co. v. Dryden*, ante, p. 393; and for the reasons given in the opinion in that case, this must be decided in the same way in which that case was decided.

The judgment below is affirmed, with costs.

G. V. Howk, *W. W. Tuley*, *M. C. Kerr*, and — *Hisey*,
for appellant.

D. C. Anthony, for appellee.

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MITCHEL *v.* NOELL ET AL.

PROMISSORY NOTE.—Demurrer.—Practice.—No Error to Sustain Demurrer to Paragraph where Facts are Admissible under Other Paragraphs.—Suit against the maker of a promissory note negotiable by the law merchant, and indorsed by the payee to the plaintiffs. Answer, first, the general denial; second, that defendant made the note for the accommodation of the payee, who indorsed the same to G. & Bro., that G. & Bro. are the legal and equitable owners thereof, and the plaintiffs had not, at the commencement of the suit and have not now, any legal or equitable interest therein; sixth, that said note was made and delivered by the defendant to the plaintiffs by the hands of one M., their authorized agent, in renewal of a certain note of the defendant, payable to G. & Bro., which note was pledged by G. & Bro. to the plaintiffs, as collateral security for a debt; that after said note sued on was so delivered to plaintiffs, the defendant, by and through said agent, M., agreed with said plaintiffs that the said defendant would procure one S. to become an indorser on said note, and to pledge certain collateral security to secure such indorsement, on condition that the defendant should be released from any liability as maker on said note, and that said S. should be held as maker thereof; that defendant performed his agreement, and plaintiffs collected a large sum on said collaterals, the amount being unknown to defendant; that defendant has fully paid and satisfied said S. the sum of money mentioned in said note, and that a suit is now pending in the United States court in this district, wherein the plaintiffs are seeking to enforce said note against said S. A reply was filed to the second and sixth paragraphs. The defendant further answered in a fifth paragraph, that the defendant had some arrangement with M., the first holder of the note in suit after its blank indorsement by S., that the defendant was not to be held liable as maker; and that M. was acting as the agent of the plaintiffs. A demurrer to this fifth paragraph was sustained.

Held, that all evidence admissible under this paragraph might have been given under the second and sixth paragraphs of the answer, and the sustaining of the demurrer did no injury.

SAME.—Contemporaneous Agreement in Conflict With Terms of Note.—A third paragraph of answer was filed, setting up an agreement contemporaneous with the making and indorsement of the note, by which the maker was not to be held liable. A fourth paragraph stated a like agreement with M., to whom it first passed by the indorsement of S., but charged no notice to the plaintiffs. A demurrer was sustained to each paragraph.

Held, that the ruling was correct.

APPEAL from the Marion Common Pleas.

PETTIT, J.—The appellees sued the appellant on the following note and indorsement:

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"INDIANAPOLIS, April 1st, 1868.

"One year after date, I promise to pay to the order of Samuel Strauss two thousand nine hundred and eighty-eight and $\frac{88}{100}$ dollars, at the First National Bank of Indianapolis, value received, without any relief from valuation or appraisement laws.

J. MITCHEL.

"Endorsed. S. STRAUSS."

The complaint was in the usual and proper form, showing the making and endorsement of the note, and that the plaintiffs were the holders and owners of the note, and that it was unpaid, and demanding judgment, etc. The answer was in six paragraphs.

First. The general denial.

Second. And the said defendant, Jacob Mitchel, for further answer to the plaintiffs' complaint, says that he made the note therein sued on for the accommodation of Samuel Strauss, the payee of said note; that he received no consideration for the said note from the said Samuel Strauss; that the said Samuel Strauss indorsed the said note to certain parties doing business under the firm name of Glasor & Brothers; that the said Glasor & Brothers are now, and at the commencement of this suit were, the legal and equitable owners of said note, and that the said plaintiffs have not now, and did not at the commencement of this suit, have any legal or equitable interest whatever in said note. *

Third. And the said defendant, for further answer to the plaintiffs' complaint, says that the note sued on was made by the defendant for the accommodation of Samuel Strauss, the payee of said note, and without any consideration passing from the said Samuel Strauss to the defendant; that the said Samuel Strauss indorsed said note to certain parties doing business under the firm name of Glasor & Brothers; that the said firm of Glasor & Brothers, at the time they received said note from the said Samuel Strauss, had transferred to them, along with said note, by the said Samuel Strauss, certain collateral security, in consideration of which fact, and in further consideration of the fact that the said

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firm of Glasor & Brothers was indebted to the said Samuel Strauss in a large sum of money, to wit, in the sum of two thousand seven hundred dollars, the said firm of Glasor & Brothers agreed to release the defendant from any and all liability upon said note; that the said note was transferred by delivery by Lewis Glasor and Max Glasor, partners in the said firm of Glasor & Brothers to the plaintiffs in this case, who received the same as collateral security for a pre-existing debt to them by the said Lewis Glasor and Max Glasor, with full notice and knowledge of the fact that the said firm of Glasor & Brothers had so agreed to release this defendant from any and all liability upon said note, and that the said Lewis Glasor and Max Glasor also transferred to the plaintiffs, along with said note, the collateral security so received as aforesaid, by the said firm of Glasor & Brothers from the said Samuel Strauss, and that such collateral security is still in the hands of the plaintiffs; that said plaintiffs can collect said collateral security by due diligence.

Fourth. And the said defendant, for further answer to the plaintiffs' complaint, says that he made the note therein sued on for the accommodation of Samuel Strauss, the payee of said note, and wholly without consideration; that the said Samuel Strauss transferred said note by indorsement to certain parties doing business under the firm name of Glasor & Brothers, pledging to them at the time certain other notes, secured by mortgage upon real estate, as collateral security for the note sued on; that the said firm of Glasor & Brothers, upon such transfer of the note sued on, and the receipt of such collateral security, thereupon agreed with the said Samuel Strauss and this defendant not to look to this defendant for the payment of the note sued on until such collateral security should be exhausted by them; that the said firm of Glasor & Brothers transferred the note sued on, together with such collateral security, to the plaintiffs as collateral security for the payment of an account in the sum of three thousand dollars owed to the plaintiffs by

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Lewis Glasor and Max Glasor, partners in said firm of Glasor & Brothers; that the said Lewis Glasor and Max Glasor have, since the commencement of this suit, filed their petition in bankruptcy in, and been adjudged bankrupts by, the district court of the United States for the northern district of New York, according to the provisions of the act of Congress entitled "an act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867; that the said plaintiffs have proved their said account before a register in bankruptcy, according to the provisions of said act of Congress; that the defendant is informed, and believes and avers the fact to be, that the estate of the said Lewis Glasor and Max Glasor, bankrupts, as aforesaid, will yield as a dividend to the plaintiffs at least fifty cents to the dollar on their said account against the said Lewis Glasor and Max Glasor, as collateral security, for which the plaintiffs hold the note sued on as aforesaid.

Sixth. The defendant, Jacob Mitchel, for further answer to the plaintiffs' complaint, says, that the note therein sued on was first made and delivered by this defendant to the said plaintiffs at the hands of one Max Glasor, who was the duly authorized agent of the said plaintiffs, in renewal of a certain note of this defendant, by the firm name of J. Mitchel & Co., payable to a certain firm known as Glasor & Brothers, which the said firm of Glasor & Brothers had, long before the date of the note sued on, pledged to the said plaintiffs as collateral security for a debt; that after the note sued on was so made and delivered to the said plaintiffs at the hands of said Max Glasor, the agent of said plaintiffs, as aforesaid, the defendant entered into an agreement with the said plaintiffs, by and through their said agent, Max Glasor, to procure one Samuel Strauss to become an indorser on said note, and to pledge to the said plaintiffs collateral security to his said indorsement, in consideration and upon condition that this defendant should be released from any and all liability upon said note, as maker thereof, and that the said Samuel

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Strauss should assume, and be held for, the payment of the same; that pursuant to such agreement, this defendant did procure the said Samuel Strauss to indorse said note, and to pledge to the said plaintiffs collateral security to his said indorsement, and to assume the payment of said note; that the plaintiffs received from their said agent said note so indorsed by said Samuel Strauss, as well as the collateral security so pledged by the said Samuel Strauss, with full knowledge of the premises, and with full knowledge of such agreement, and have collected a large sum of money upon said collateral security, the amount of which this defendant does not know; that this defendant has fully paid and satisfied to the said Samuel Strauss the sum of money mentioned in said note, and that a suit is now pending in the circuit court of the United States, for the district of Indiana, wherein these plaintiffs are plaintiffs, and the said Samuel Strauss is defendant, whereby these plaintiffs are seeking to enforce said note against the said Samuel Strauss.

Demurrsers for want of sufficient facts were sustained to the third, fourth, and fifth paragraphs of the answer, and there was a reply of general denial to the second and sixth paragraphs of the answer.

The only questions before us in this case are, were the third, fourth, and fifth paragraphs of the answer, or either of them, good? and if good, could not all the evidence that could have been given under them, or either of them, have been given under the second and sixth paragraphs of the answer? If all the evidence that could have been given under the third, fourth, and fifth paragraphs might have been given under the general denial and the second and sixth paragraphs of the answer, then the appellant was not injured by sustaining demurrsers to the third, fourth, and fifth paragraphs.

The third paragraph of the answer is clearly bad, for setting up a parol agreement contemporaneous with the making and endorsement of the note, by which the maker was not to be held liable on it.

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The fourth paragraph sets up and alleges a similar parol agreement with the Glasors, to whom the note first passed by the blank indorsement of Strauss, but does not allege any notice to the plaintiffs, who were indorsees and holders of commercial paper. For this defect it is clearly bad.

The fifth paragraph is immensely long, and for that reason we omit to set it out; but its substance is, that the defendant had some arrangement with Glasor, who was the first holder of the note after the blank indorsement of Strauss, the payee, that the defendant was not to be held liable as maker, and setting up circumstances to show that in that arrangement or agreement Glasor was acting as agent of the plaintiffs, and seeking to bind them by Glasor's acts. Without holding that the paragraph, in its great length, is good or bad, we hold that the sixth paragraph sets up, in substance, the same matter, and that all the evidence, which might have been given under the fifth paragraph, could have been given under the second and sixth paragraphs of the answer, and therefore no injury was done to the appellant by sustaining a demurrer to it.

The case was tried by the court; finding and judgment for the plaintiffs for the amount of the note. On the trial the appellant (defendant below) offered no evidence whatever, though he had two paragraphs of his answer under which he might have proved all that was necessary to defeat a recovery on the note, if he had the proper evidence to offer; which strongly impresses us with the conviction that his whole defence had no merit in it.

The judgment is affirmed, at the costs of the appellant, with two per cent. damages.

U. J. Hammond and J. M. Judah, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellees.

Dandistel *v.* Kronenberger *et al.*

MITCHEL *v.* BERNHEIMER ET AL.

APPEAL from the Marion Common Pleas.

PETTIT, J.—This case is the same, in all legal respects, and so admitted to be by the counsel on both sides, as the case of *Mitchel v. Noell, ante*, p. 399, and must abide its fate.

The judgment is affirmed, at the costs of the appellant, with two per cent. damages.

U. F. Hammond and F. M. Judah, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellees.

DANDISTEL *v.* KRONENBERGER ET AL.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—*Section 519 of the Code.*—The complaint in a proceeding supplementary to execution, under section 519 of the code, must state that the execution debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment.

SAME.—*Section 518 of the Code.*—*Execution Against Part Only of Judgment Defendants.*—If the language of section 518 would seem to contemplate the issuing of an execution against part only of the judgment defendants, it must be held to apply to cases where by statute for any cause such separate execution may issue. The execution should issue not only against the execution defendant, but also against the replevin bail, to authorize proceedings supplementary to execution.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This proceeding was commenced under the statute relating to proceedings supplementary to execution. 2 G. & H. 260, *et seq.* The appellee has furnished us no brief, and we, as well as counsel for the appellant, are at a loss to know whether the proceeding is intended to be based on section 518 or on 519. There was a verified complaint filed by the plaintiffs, in which they state the recovery of a judgment before a justice of the peace in their favor against the appellant and her husband, who had died after the rendition of the judgment, and before the commencement of

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this proceeding, the filing of a transcript of the judgment and the statutory affidavit in the office of the clerk of the Vanderburg Common Pleas, the issuing of an execution thereon and its return *nulla bona*, and that the said judgment remains unpaid. It asks an order to said appellant to appear and answer at the next term of the circuit court as to her property in said county of Vanderburg. The transcript, execution, etc., or copies of them, are filed with the complaint and referred to therein.

The defendant moved the court to dismiss the proceeding, which motion was overruled. She also demurred to the complaint, and her demurrer was overruled. She then answered, and there was a reply, trial by the court, finding for the plaintiffs, motion for a new trial made by the defendant overruled, and judgment for the plaintiffs.

It is quite evident that the proceeding cannot be sustained under section 519; for the complaint fails to state that the judgment debtor has property which she unjustly refuses to apply toward the satisfaction of the judgment, a statement expressly required by that section. The fact that a return of the execution is alleged, which is necessary under section 518, and is not necessary under section 519, and the fact that the order contemplated by section 518, that the defendant appear and answer as to her property in the county, is asked, satisfy us that the proceeding was intended to be predicated upon section 518, and that if it can be sustained at all, it must be under that section.

We are of the opinion, however, that the judgment cannot be sustained under section 518.

That section provides, that "when an execution against the property of the judgment debtor, or any of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in the State, to the sheriff of the county where the judgment is rendered, is returned unsatisfied, in whole or in part, the judgment creditor, after such return is made, shall be entitled to an order," etc. If this language would seem to contemplate the issuing

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of an execution against part only of the judgment defendants, it must be held to apply to cases, if any such there be, where by statute, for any cause, such separate execution may issue. As a general rule, the execution must issue pursuant to the judgment, and against the parties who are judgment defendants, and not against a part of them. 2 G. & H. p. 231, sec. 411, and p. 267, sec. 541.

In this case there was replevin bail upon the judgment entered on the docket of the justice of the peace, before the transcript was filed, as appears from the transcript filed with the complaint; and the execution issued by the clerk was issued against the appellant alone, and not against her and the replevin bail jointly, as required by section 84, 2 G. & H. p. 602, and sec. 428, p. 236. Where the issuing and return of an execution are required, it must be intended that a legal execution was meant. The return of the sheriff on the execution was, that the appellant had no property which he could find on which to levy to make the amount of the execution, or any part of it. If the execution had gone out against the principal and the replevin bail jointly, as required, the money might possibly, and for aught that appears, have been made without a resort to this proceeding. At all events, it does not appear from the record that a legal execution was issued and returned no property found, and hence there was no valid and sufficient foundation for the making of an order for the appellant to answer as to her property. This defect goes back to the commencement of the proceeding.

The judgment is reversed, with costs, and the cause remanded, with instructions to dismiss the proceeding.

P. Maier, F. E. McDonald, F. M. Butler, and E. M. McDonald, for appellant.

F. S. Buchanan and H. C. Goading, for appellees.

Hunt, Adm'r, v. Price.

HUNT, ADM'R, v. PRICE.

PRACTICE.—Preponderance of Evidence.—The court below having seen the witnesses face to face, heard their evidence, perhaps knowing their characters for truth and veracity, and having seen and observed their willingness and readiness, or reluctance and hesitancy, in answering questions, the Supreme Court will not reverse its action in overruling a motion for a new trial on the question of the weight of evidence, there being evidence tending to support the finding of the jury.

APPEAL from the Howard Common Pleas.

PETTIT, J.—The appellee sued the appellant, to recover for work and labor done and services rendered by her to and for the appellant's intestate in his lifetime, alleging that she had served him for twenty years with an understanding and agreement that she was to be paid for her services, and, further, that if she outlived him, he agreed to leave her his property. Proper issues were formed; trial by jury; verdict for plaintiff (appellee). Motion for a new trial overruled, and judgment on the verdict. The only question in the case is on the evidence. We may admit that if this was an original question before us as it appears in the record, we should not have found as the jury did, or ruled as the court did on the motion for a new trial; yet there is evidence which tends to show the right of the plaintiff below to recover, and on which the jury were justified in finding as they did, and the court in ruling as it did in overruling the motion for a new trial.

We cannot disturb the verdict or judgment. The reasons for this rule have so often been stated that it is hardly necessary to restate them. But we will say again that the jury and court below saw the witnesses face to face, heard their evidence, may have known their characters for truth and veracity, saw and observed their willingness, readiness, or reluctance and hesitancy in answering questions, which we cannot see, know, or judge of, as the written evidence is presented in the transcript.

The judgment is affirmed, at the costs of the appellant.

M. Bell and A. S. Bell, for appellant.

C. D. Murray, for appellee.

Warner et al. v. Campbell et al.

WARNER ET AL. v. CAMPBELL ET AL.

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BILL OF EXCEPTIONS.—*Striking Out.*—A question as to the propriety of the action of the court in striking out a paragraph of pleading can only be presented to the Supreme Court by bill of exceptions.

SAME.—*Time.*—A bill of exceptions must appear by the record to have been not only signed, but also filed, within the time limited by the court.

SUPREME COURT. — *Rehearing.*—A rehearing will not be granted by the Supreme Court in order to enable a party to have the record amended.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The appellees sued Isaac Warner, Simeon Warner, and James W. Wilson. They asked no judgment against Wilson. He made default. After issues had been made as to the Warners, there was a trial by jury, verdict for the plaintiffs against them, motion by Isaac Warner alone for a new trial overruled, and judgment against the two Warners for the amount of the verdict. The appeal was taken by both the Warners, as appears by the notice which was served on the appellees and the clerk. The errors are assigned by Isaac Warner alone. Process was issued by the clerk of this court in the name of Isaac Warner alone, following the assignment of errors, as it was proper to do. Passing over these apparent irregularities, we will consider the questions attempted to be raised, and dispose of the case.

The first error alleged is, that the court improperly struck out the third paragraph of the answer. This question is not reserved by bill of exceptions, and hence we cannot decide it. *The Indianapolis Piano Manuf'g Co. v. The First National Bank*, 33 Ind. 302, and cases cited.

The error assigned, that the court erred in refusing a new trial on the motion of the defendants, covers all the other questions in the case. This question depends upon the facts shown by the bill of exceptions. Sixty days were given in which to prepare and file the bill of exceptions. The judge says, in the concluding part of the bill of exceptions, "And now, within said sixty days, the defendants tender their bill of exceptions, which is approved by the court and made a part of the record of this cause," etc. It does not any-

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where appear when the bill of exceptions was actually filed. This court has repeatedly held that when time is given in which to file a bill of exceptions, the record must show affirmatively that it was filed within the time given. *Peck v. Vankirk*, 15 Ind. 159. The bill of exceptions not appearing to be properly in the record, we cannot decide, therefore, whether the motion for a new trial was correctly refused or not, but should presume that it was.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

DOWNY, J.—We are asked to grant a rehearing in this case, on the ground that the clerk, in making out the transcript, failed to show the filing of the bill of exceptions in time; and the certificate of the clerk stating when the bill of exceptions was filed, and that it was by his error that the transcript does not show when it was filed, is presented with the petition for a rehearing.

We regret that we are compelled in this case, as we are in many others where like applications are presented, to refuse the request. The writ of *certiorari* is freely granted by this court, on a proper suggestion of diminution of the record, at any time before the cause has been submitted, and, indeed, has often been allowed after the submission of the cause. It has not been the practice of this court to grant a rehearing that the record may be amended. Such a practice could not be allowed. It is not the practice in any court to allow a new trial or a rehearing, merely that the party may amend his pleadings and present the case in a new form. We should make little progress in the business on the docket of the court, should we allow such a practice. Counsel must, in this court, as in others, examine the records and papers, and see that they are correct before the case is passed upon.

Petition overruled.

G. H. Voss and B. F. Davis, for appellants.

N. B. Taylor and E. Taylor, for appellees.

Huff v. Kimball, Treasurer of State.

HUFF v. KIMBALL, TREASURER OF STATE.

PLEADING.—*Mandate.*—*Treasurer of State.*—*Warrant.*—To sustain a mandate against the treasurer of state, requiring him to pay a warrant drawn by the auditor of state, July 13th, 1859, on the swamp land fund, and presented for payment September 25th, 1869, it was not sufficient that it was alleged, that there was money in the treasury applicable to the payment when the warrant was drawn, but it should also have been averred that there were sufficient funds in the treasury proper to be so applied when the warrant was presented.

APPEAL from the Marion Circuit Court.

DOWNNEY, J.—This was a proceeding by mandate instituted by Huff against the appellee, to compel him to pay a warrant drawn on the treasurer of state by the auditor of state, in favor of one Jacob Merkle, and assigned by him to the appellant. The warrant, a copy of which is filed with the affidavit, is as follows:

“No. 9,055. SWAMP LANDS, JASPER CO., \$3,475.00
STATE OF INDIANA.

TREASURY DEPARTMENT, AUDITOR'S OFFICE, }
INDIANAPOLIS, July 13th, 1859. }

“The treasurer of state will pay to Jacob Merkle the sum of thirty-four hundred and seventy-five dollars and — cents, and this shall be his warrant. Services, commissions, etc.

JOHN W. DODD, Auditor of State.”

It is stated in the affidavit that the appellant is the holder and owner of the warrant; that the warrant was duly registered on the books in the office of the auditor at the date of its issue, and that the then treasurer of state of said State of Indiana had due and legal notice thereof; that at the date of issuing said warrant there were, as affiant is informed and believes, funds in the hands of the treasurer of state, as such, not otherwise appropriated, applicable to the payment of said warrant, out of which it might have been paid. Affiant further says that in the year 1861, Merkle, for a valuable consideration, assigned said warrant to him by indorsement thereon under his hand; that before the making of this affidavit, on the 25th day of September, 1869, at the office of

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the treasurer of said State, within business hours, he presented the said warrant to the said Kimball, then and still treasurer of state, and demanded payment of the same, which he then and there refused, and still refuses to make, in whole or in part, and it still remains unpaid; wherefore, etc.

The defendant demurred to the affidavit, and his demur-
rer was sustained, and final judgment rendered for the defendant.

The sustaining of the demurrer is the error assigned. There is a motion made by the appellee, based on an affidavit of his, stating that on the 10th day of February, 1871, he ceased to be treasurer of state, and James B. Ryan became his successor in that office, in which he asked that the appeal may for that reason be dismissed. The questions presented may be stated as follows:

First. Should the appeal be dismissed for the reason as-
signed?

Second. If not, is the warrant assignable or negotiable so as to enable Huff, as the assignee or indorsee, to maintain the action upon it?

Third. Are the facts stated in the affidavit sufficient to justify the issuing of a peremptory mandate?

As we have reached a conclusion on the last point in favor of the appellee, it will not be necessary that we shall decide the other questions.

It is insisted with reference to this third point by the appellant, "that the issuing of the warrant was an appropria-
tion of the amount it called for from the time the treasurer had notice of the issuing of the warrant, and that from that time the money was held in the treasury in trust for the holder of the warrant, and by presumption of law it remained in the hands of the treasurer when the demand was made." The position contended for amounts to this, that when such a warrant is drawn by the auditor upon the treasurer of state, and duly registered by him, and the treasurer has notice of this, as it is alleged he had in this case, the treasurer must thereafter hold the amount of money called for by the war-

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rant in trust for the party in whose favor the warrant is drawn, and that such party, or his assignee or indorsee, may at any time thereafter demand and receive the amount.

The warrant in this case was drawn July 13th, 1859, and was never presented until September 25th, 1869, more than ten years afterward. If the sum of money becomes set apart and specially appropriated in trust for the party who holds the warrant, must each successive treasurer receive it from his predecessor, and hold it in trust from year to year and from term to term? We cannot think so. We have examined the statutes on the subject of the sale, etc., of the swamp lands and the duties of the auditor and treasurer of state relating thereto, and find no provision justifying such conclusion. The warrant is not payable out of the general fund, but out of the swamp land fund of the particular county in the hands of the treasurer of state. We think it should have appeared that there was money in the hands of the treasurer when the order was presented, applicable to its payment, and that it is not enough to allege that the money was in the hands of the treasurer when the warrant was drawn. The seventh section of the act to provide a treasury system, Acts of 1859, p. 230, provides that if there be money of such fund in the treasury when the warrant is presented, the treasurer shall pay it, and not otherwise. The warrant could not have been paid out of any other fund than the swamp land fund of the particular county, and if that fund, supposing it to have been in the treasury when the order was drawn, had been improperly paid out, it would be a question whether the State could be made liable to pay it out of the general fund, or whether the remedy would not be against the officer.

The judgment is affirmed, with costs.

S. A. Huff and B. W. Langdon, for appellant.

F. N. Kimball, for appellee.

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LAW v. HENRY ET AL.

CONTRACT.—*Specific Performance.*—Statute of Frauds.—Where a father induced his daughter, her husband and children, to break up their residence and move a long journey, at considerable expense, to a place near his home, that he might enjoy their companionship, by a promise to convey land to the daughter, and he, accordingly, purchased and placed them in possession of land upon which they made valuable improvements, and of which he made a deed, but had not delivered it to his daughter when she died; *Held*, in an action by the husband and children (after the death of the daughter), against the father, for specific performance of the contract, that there was a good and valuable consideration for the contract, it was not within the statute of frauds, and must be enforced in their favor.

SAME.—*Demand.*—The father wholly denying any obligation to perform said equitable contract, a demand of him for a deed was not necessary to entitle the husband and children to maintain said action.

APPEAL from the Tipton Circuit Court.

PETTIT, J.—This suit was brought by the appellees against the appellant for a specific performance, and the following is the full complaint in the case:

“Thomas E. Henry, for himself, and Clara Henry and Matt S. Henry, infants, under the age of twenty-one years, by the said Thomas E. Henry, their father and guardian, plaintiffs, complain of Joel Law, defendant, and, complaining, say that said defendant, Joel Law, is and was the father of one Jane Henry, now deceased, late wife of the said Thomas E. Henry and mother of the said Clara and Matt S. Henry; that said defendant is a man of easy circumstances in life, and is and was at the time of the making of the contract, hereinafter stated, worth forty thousand dollars, and the father of seven children, six of whom are now living; that heretofore, to wit, on the 1st day of September, 1867, said plaintiff, Thomas E., together with his wife then living, and the said Clara, their infant child, were residing and living in Shelby county, in the State of Indiana, surrounded with friends and relatives, and although poor, were in prospering circumstances in life, and that the said Joel Law was, and for some time had been, a resident of Tipton county, in said State; that said defendant, Joel Law, being

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desirous of the association of his children, and desiring that said plaintiff, his wife and child, should reside near to, and in the immediate neighborhood with him, he, the said defendant, in order to induce said plaintiff and his said wife, then living, to remove to Tipton county, and in the immediate neighborhood of said defendant, promised and agreed that if the said Thomas E. Henry, together with his family, would remove to Tipton county, as aforesaid, the said defendant would purchase for and deed to the said Jane Henry thirty-five or forty acres of land, in said Tipton county, in the State of Indiana, and the plaintiffs aver that, in consideration of the aforesaid inducement, promise, and agreement of said defendant, he, the said Thomas E., together with his family, did remove to said Tipton county, Indiana, in consideration of the aforesaid promise of said defendant; that in said removal, as aforesaid, said plaintiff, Thomas E., incurred a great loss of time and incurred a large expense, to wit, one hundred dollars; that upon the plaintiffs' arrival in said Tipton county, said defendant was the owner of a house and three acres of ground, which said house was situated in said Tipton county, and in the immediate neighborhood of said defendant; that said defendant was then negotiating for thirty-two acres more adjoining to and connected with said three acres as aforesaid, which two pieces constitute and are the south-west quarter of the south-west quarter of section number twelve, township number twenty-one, north of range number three east, except that part of said described real estate that is situate south of the Tipton, Tetersburg, and Berlin Gravel Road, said pieces of land then being owned and then being negotiated for containing thirty-five acres, and of the worth of one thousand five hundred dollars; and that defendant, in pursuance of his said promise and agreement, put said plaintiff, Thomas E., and his said wife into possession of said three-acre tract of ground, and further promised and agreed by and with plaintiff and his said wife that as soon as he, the said defendant, obtained a title to said thirty-two-acre tract, he would convey the whole of said thirty-five acres to said

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Jane Henry; that afterward, to wit, on the — day of —, 186—, said defendant obtained deeds for said thirty-two-acre tract of land; that in pursuance of his said promise and contract, he immediately put said plaintiff and his wife into possession of said thirty-two-acre tract of land; and plaintiffs aver that said Jane Henry, by herself and her said husband, made permanent and lasting improvements on said real estate, to wit, to the amount of one hundred dollars; and the plaintiffs further aver that said defendant, in further consummation of said contract, did, on the 18th day of September, A. D., 1869, make, execute, and acknowledge his certain warranty deed, a copy of which is filed herewith and made a part of this complaint, conveying to said Jane Henry the thirty-five acres of real estate hereinbefore described; that before the delivery of said deed to the said Jane Henry, to wit, on the 15th day of November, 1869, the said Jane Henry departed this life, leaving as her sole heirs at law her said husband, Thomas E. Henry, and her two infant children, Clara and Matt S. Henry. Plaintiffs herein say that said defendant has failed and refused to deliver said deed, and failed and refused to convey said real estate to these plaintiffs, or either of them; wherefore, plaintiffs ask the court to order the delivery of said deed to said plaintiffs, or to order the defendant to convey said real estate to said plaintiffs, in equal proportions to said plaintiffs, and on failure of the defendant so to do, then to appoint a commissioner to make such conveyance, and such other relief as may be just and proper."

To this complaint there was a demurrer for want of sufficient facts overruled, and exception taken.

Was this ruling right? We hold that it was, and most clearly equitable.

All the consideration asked or agreed upon was paid, both good and valuable; good, the companionship of his daughter and her family; valuable, the breaking up a residence and moving a long journey at considerable expense; and under all the circumstances, and as it was all the defendant asked

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for, and estimated the land worth, we hold that the consideration was adequate and sufficient. It is clear, to our mind, from the whole case, that if his daughter had lived a short time longer (as we gather from the case she died from the effects of giving birth to her second child, Matt S.), the deed would have been delivered to her; but on her death, and when there was a greater necessity that he should comply with his contract to her bereaved husband and infant children, he most unconscionably refused to do so. Possession was given and taken, and valuable improvements made. The plaintiffs and their ancestor having done all that they could or were required to do, the case is not within the statute to prevent frauds. A statute made to prevent, should not be allowed to protect and consummate, frauds, which would be its effect if this contract could not be enforced. We shall not give our sanction to so great a wrong as this would be.

It is objected that the complaint contains no averment of a demand for a deed before suit brought. None was necessary. When a man is bound in equity to do a certain thing, and he wholly denies his obligation or duty and the right of the plaintiff to recover, no demand is required. *Bruce v. Tilsom*, 25 N. Y. 194, *Heard v. Lodge*, 20 Pick. 61, and many other authorities that we might cite, fully warrant this ruling.

An answer of the statute to prevent frauds was filed, and a demurrer, for want of sufficient facts, was filed to it and sustained, and exception taken. There was no error in this. The complaint shows that the contract was not in writing, but seeks to take the case out of the statute by showing payment, possession, and valuable improvements, and hence an answer that it was not in writing was unnecessary and improper.

There was a trial by jury and verdict for the plaintiffs. Motion for a new trial for the reasons, first, that the verdict of the jury is not sustained by sufficient evidence; second, that the verdict of the jury is contrary to law. The evidence is somewhat conflicting, but we think it covers and sustains, by a large preponderance, the allegations of the complaint.

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The general denial was filed to the complaint, and on this issue the case was tried. If the evidence had been more conflicting, but had shown that there was any evidence that reasonably sustained the verdict, we would not disturb the verdict of the jury or judgment of the court. The reason of this rule has so often been stated that we deem it unnecessary to repeat it or refer to the cases. It follows that the verdict is not contrary to law.

The judgment and decree is in all things affirmed, at the costs of the appellant.*

F. Green, D. Waugh, G. H. Voss, B. F. Davis, and J. A. Holman, for appellant.

N. R. Overman, for appellees.

*Petition for a rehearing overruled.

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STREET RAILROAD.—Contributions.—Damages.—Where contributions are made to secure the building of a street railroad, and the regular running of cars thereon a specified number of daily trips, the company receiving such contributions may stipulate that the damages for a failure to comply with these conditions shall be the sum contributed and interest thereon from the date of failure.

SAME.—Contract.—Mutuality.—Consideration.—Signing.—Such a stipulation, it was held, was not void for want of mutuality, or of consideration, though not signed by the party making the subscription, the obligation on his part being evidenced by his promissory note, previously executed, which was paid by him upon the execution by the company of the instrument containing said stipulation, the company having verbally agreed, at the time of the execution of said note, that the maker, who was interested in the maintenance of the road, should have some security for its permanent working, and the instrument containing said stipulation purporting to be made in consummation of said verbal agreement.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—The appellee sued the appellant, and had judgment against it, from which it appeals to this court. The Crown Hill Railway Company was organized to construct a railroad from the city of Indianapolis to Crown Hill Cem-

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etary. On the 31st day of July, 1866, Armstrong, in consideration of the benefits to result to him from the construction of the road, executed to the company two notes, by one of which he promised to pay to the company twenty-five hundred dollars at the commencement of the construction of the road, and by the other he promised to pay to the company a like amount on the running of the cars on the road.

On the 14th day of August, 1866, the following agreement was entered into by and between the said railroad company and the Citizens' Street Railway Company of Indianapolis:

"This agreement, made and entered into this 14th day of August, 1866, between the Crown Hill Railway Company, a corporation organized under the laws of Indiana, party of the first part, and the Citizens' Street Railway Company of Indianapolis, a corporation organized under the laws of Indiana, party of the second part, witnesseth:

"That whereas the party of the first part were organized for the purpose of furnishing a cheap, convenient, and speedy means of access for the citizens of Indianapolis and its vicinity to Crown Hill Cemetery, as well as to accommodate the citizens along and adjacent to the line of their road in travelling to and from the city of Indianapolis, and in aid of their said purpose divers persons in the vicinity of said road have contributed as a donation the sum of ten thousand dollars, and have also granted the right of way on the sole condition that the said road shall be built, suitably stocked, kept in repair, and so operated and run as to afford them reasonable accommodation in travelling to and from the city of Indianapolis;

"Now, therefore, for the purpose of more effectually accomplishing their said purpose, the said party of the first part have resolved to, and have entered into a contract with the said party of the second part, on the terms and conditions following, to wit:

"1st. The party of the first part hereby agrees to construct and complete, at their own cost, within ninety days from this date, according to the plans and specifications for the con-

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struction of said road contained in a contract made by and between said Crown Hill Railway Company and Elijah S. Alvord and Calvin Fletcher, a railroad track from the end of the Citizens' Street Railway, at the crossing of Tinker and Illinois streets, in the city of Indianapolis, to the west gateway of Crown Hill Cemetery on the Michigan road, with the necessary spurs and switches suitable for use as a street or horse railroad.

"2d. In consideration of the stipulation hereinafter contained, the party of the first part hereby perpetually lease, free of all charge to the party of the second part forever, their said railroad, to be completed as aforesaid, including the track, grading, iron, and all the structures thereon or pertaining thereto, together with the right of way, the right to use and operate the same, and taking tolls thereon.

"3d. The party of the second part agrees to stock and equip the said road in a manner suitable and sufficient to furnish ample accommodations for all persons desiring to travel on the same, and especially for funerals to Crown Hill Cemetery, and to keep the said road amply stocked and equipped for both purposes; and also to keep the said road in good repair forever; and further, if the party desires at any time to make any changes, additions, or improvements whatever in or upon said road, they shall have the privilege of doing so, but at their own expense; except that this permission shall not include any change in the route of the road as first established, without the written approval of the said Crown Hill Railway Company; and the party of the first part shall in no event be liable for any cost or expense whatever for anything connected with the said road or bridges thereof, its management, operation, change, addition, or improvements, including all taxes, income, or other public charges on the road, after the same shall have been completed and finished as hereinbefore provided for.

"4th. The said road shall be operated by the party of the second part so as to answer all reasonable demands of travel, and accommodate the wants and convenience of persons

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residing along and near its line; and to this end, there shall be run not less than six round trips a day, except that on the Sabbath day not more trips shall be required than reasonably to accommodate the residents near the road in attending church services in the city. Suitable funeral cars shall also be furnished at all reasonable times for funerals.

"5th. The fare or toll for conveying passengers between Tinker street and the gate of Crown Hill Cemetery shall not exceed fifteen cents either way for a single trip, and twenty-five cents for a round trip out or in and back during the same day. Tickets for said round trip, except for funerals, to be furnished and purchased at the office of the company of the second part. The fare for conveying persons attending funerals from any part of the city of Indianapolis whence the funeral is to proceed, used by said street railway company, shall not be more than the established fare for a round trip for conveying other passengers between Tinker street and Crown Hill Cemetery; except the funeral car or car conveying the corpse, the relatives and the pall-bearers, to the extent of twenty persons, shall be estimated as containing thirty passengers, and shall be charged at the established rate of fare as containing the number of thirty persons for a round trip; and the fare for persons residing on or near the line of said railway between the Westfield Gravel Road and Michigan Road shall not be more than five cents between Washington street and the said Fall Creek bridge on said railway, and the same fare for persons visiting said grounds.

"6th. And it is further expressly agreed and stipulated that the aforesaid perpetual lease is upon the express condition that the party of the second part shall in all respects keep, perform, and observe all the agreements, contracts, and stipulations by them to be kept, performed, and observed; and that in case they shall fail or neglect to keep, perform, and observe the same, or any one of them at any time for a continuous period of thirty days, unless prevented by providential or unavoidable circumstances, they shall forfeit all

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their rights under this contract, and all the property and franchises herein granted to them, and the same shall revert to and become the property of the party of the first part as fully to all intents and purposes as if this contract had never been made; and in such case the party of the first part may, at their discretion, re-enter upon and take possession of all the property, rights, and franchises hereby conveyed.

"7th. It is further mutually agreed by the parties hereto, that if at any future time it shall be discovered, or if it shall be decreed by competent counsel that any other or further conveyances, contracts, or assurances are necessary to carry into full and complete effect the purposes of this contract in good faith, then the same shall be forthwith executed and submitted by the proper party.

"In testimony whereof, the parties have caused these presents to be signed by their respective presidents, and to be attested by their respective seals hereunto attached.

"T. A. MORRIS, President

"Crown Hill Railway Company.

"E. S. ALVORD, President

"Citizens' Street Railway Company.

"W. H. ENGLISH, Treasurer."

On the 8th day of May, 1867, the following agreement, on which the suit is predicated, was executed by and between the Crown Hill Railway Company and John Armstrong and others named therein:

"This agreement, made the 8th day of May, 1867, between the Crown Hill Railway Company, a corporation organized under the laws of the State of Indiana, of the first part, and John Armstrong, W. Clinton Thompson, James W. Green, George H. Chapman, Garrison W. Alred, Langdale & Buckhart, Joseph Moore, G. Schurmann, and John H. Lozier, of the second part, witnesseth: that, whereas the several individuals who are parties of the second part have subscribed and paid a large amount toward the construction of the Crown Hill Railway, and are interested in maintaining and the successful working of said railway; and whereas

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said railway has been and is now completed; and whereas said Crown Hill Railway Company have made a perpetual lease, free of all charges, to the Citizens' Street Railroad Company of Indianapolis, in consideration of certain agreements and stipulations and undertakings of the said Citizens' Street Railroad Company of Indianapolis; and whereas one instalment of said subscription is yet unpaid, and in order to secure the assent of said subscribers to the arrangement with the Citizens' Street Railroad Company of Indianapolis, and because when the subscriptions were made it was understood that the subscribers should have some security for the permanent and constant maintaining and working of said railway; now, therefore, it is agreed that the party of the first part will make no modification or change of contract and perpetual lease heretofore referred to, executed by the party of the first part, with and to the Citizens' Street Railroad Company, from perpetually running said railroad according to their contract with said party of the first part, without the consent of the parties of the second part personally given, or by their authorized agent, or agents, or representatives. And the party of the first part agree also that they will at all times promptly enforce, by all legal means, the said contract existing between them and the Citizens' Street Railroad Company of Indianapolis. And if at any time the party of the first part shall neglect or fail to enforce said contract with the Citizens' Street Railroad Company of Indianapolis, or prosecute for damages for any breach thereof, then the party of the second part, or any part of them, may, in the name of the party of the first part, by all legal means, enforce said contract with the Citizens' Street Railroad Company of Indianapolis, and prosecute the same for damages.

"And it is further agreed, that if at any time the said Crown Hill Railway shall cease to be operated in the same manner as in said agreement named, between the cemetery and the city of Indianapolis, except for such time or times as may be reasonably necessary for proper repairs, then the

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second party shall be entitled to recover from said first party the amount that each shall have paid as a donation for the construction of said road, with interest from the date of ceasing to operate the road.

"In witness whereof, the said parties have hereunto set their hands and seals.

"THE CROWN HILL CEMETERY RAILWAY COMPANY,
"By T. A. MORRIS, President."

Armstrong paid off the note which was first to mature, prior to the execution of this last contract, and paid the other one on the 11th day of May, 1867, three days after its execution.

It is alleged in the complaint that the Citizens' Street Railway Company of Indianapolis has not, nor has any other person or company, on their behalf, run cars upon said Crown Hill Railway, or operated it so as to answer all reasonable demands of travel and accommodate the wants and conveniences of persons residing along and near its line, nor have there been six round trips a day, except Sundays, since the 1st day of November, 1867, nor more than three trips a day for one-half of the time since that date, nor more than four trips a day for the other half of the time since that date; so that persons could not pass from one end of the line of the road to the other, or to or from intermediate points of the road by means of the cars, except at long intervals of three or four hours, or return without waiting long intervals of three or four hours, which did not answer the wants or convenience of the persons residing along said road; and that the Citizens' Street Railway Company of Indianapolis was not prevented, during any part of said time, from running more trains of cars, or making more trips, by making necessary or proper repairs. It is also alleged that, in March, 1868, the plaintiff gave the defendant notice in writing of such failure, and that unless the agreement should be complied with, he should insist upon the forfeiture of five thousand dollars, provided for in the contract; and because the defendant wholly neglected to require the contract to be

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complied with, the plaintiff, on the 10th day of April, 1868, demanded of the defendant the said sum of five thousand dollars, which it refused to pay. By means whereof the said writing became forfeited, etc.

The defendant pleaded the general denial. Of the issue thus formed there was a trial by a jury, and a general verdict for the plaintiff for five thousand eight hundred and seventy dollars, and also answers to numerous interrogatories, which it is not deemed necessary to copy into this opinion.

The defendant moved the court to grant it a new trial, for excess in the damages, because the verdict is not sustained by sufficient evidence, and is contrary to law. It was also alleged that the court had committed errors of law during the trial of the cause in admitting in evidence the two contracts above set out, and in refusing to admit proper legal material evidence to go to the jury which was offered by the defendant, and to which the defendant excepted. But what particular evidence was thus offered and excluded is not stated. It was also claimed that the court had erred in charging as and for the law that which is not and was not law, relevant to the facts, or material to aid the jury in finding a just and true verdict in said cause, in each and every charge given by said court to the jury, and especially in charging and instructing the jury as he did in each of his charges and instructions numbered two, four, and five given to said jury; in submitting each and every interrogatory requested to be given to the jury; and that the answers to the interrogatories propounded by the court at the instance of the plaintiff, as well as those propounded by the defendant, are not sustained by the evidence, but are contrary thereto.

This motion was overruled by the court, and the defendant then moved in arrest of judgment, for the reasons that the complaint does not state facts sufficient to constitute a cause of action, and because upon the whole record the judgment should be for the defendant for costs, and not for the plaintiff, on the finding of the jury.

This motion was also overruled, and judgment rendered

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for the plaintiff for the amount of the verdict. The evidence and instructions are in the record by a proper bill of exceptions.

The assignment of errors presents to this court the question as to the correctness of the action of the court in overruling the motion for a new trial, and that in arrest of judgment.

The brief of the learned counsel for the appellant seems to have been prepared for use in the case while it was pending in the common pleas, and hence it does not take up and discuss the points as they are presented by the record and assignment of errors. It is proper for us to consider the questions as they are presented by the assignment of errors.

Of the questions presented by the motion for a new trial, the first is, that the damages are excessive. It was stipulated in the contract sued upon, that "if, at any time, the said Crown Hill Railway shall cease to be operated in the same manner as in said agreement named, between the cemetery and the city of Indianapolis, except for such time or times as may be reasonably necessary for proper repairs, then the second party shall be entitled to recover from said first party the amount that each shall have paid as a donation for the construction of said road, with interest from the date of ceasing to operate the road." This question is not discussed by counsel. The parties made the rule by which the amount of damages should be measured. We think they had the right and power to do so. The damages are no greater than provided for. The interest is to be computed from the time of "ceasing to operate the road." By which is to be understood the ceasing to operate it according to the requirements of the contract.

There is no insufficiency in the evidence to support the verdict of the jury. We have examined it, and it fully justifies the findings and verdict of the jury.

There is no ground for claiming that the verdict is contrary to law.

There was no objection made to the introduction of the

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contract between the two companies in evidence, in which the ground of objection was pointed out. This, counsel know, was necessary in order to present the question here. The objection to the introduction of the contract upon which the action is predicated is thus stated: "To the giving of which in evidence, the said defendant at the time objected, for the reason that said agreement was void, and so appeared to be void on its face, for want of consideration; and because it was void for want of mutuality, and so appears, never having been signed or executed by said plaintiff, or any of the other parties of the second part thereto, as by the terms thereof appeared to have been designed and intended by said parties; and because the only consideration therefor was the promise and understanding, therein set forth, of the said parties of the second part, which, upon the face of said paper, did not appear ever to have been assented to by them." This objection the court overruled and allowed the instrument to be read in evidence.

On the question of mutuality, counsel for the appellee submit that this is no valid objection to the validity of the contract. They insist that the same objection might with equal force be made in all suits on promissory notes and bills of exchange, to actions upon the covenants in a deed, in actions on contracts in writing required by the statute of frauds, and in actions upon official bonds; in none of which cases is the instrument executed by the party bringing the action.

It is not doubted but that a contract, to be binding, must be mutual. The minds of the parties must meet and agree upon the same terms or stipulations. A mere proposition from one party, not accepted by the other, can never constitute a contract. But when the parties have made their contract, it is frequently the case that it is reduced to writing and executed on one part only, while the obligation of the other party is not evidenced by any writing signed by him, but rests only in parol. This most frequently occurs where the contract on the part of the party not executing it re-

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quires the performance of a single act, as the payment of money, or where that act is performed at the time when the contract is executed by the other party. Where the contract is executed on one part, and executory on the other part only, there seems no necessity for the execution of the instrument by the party who has nothing more to do.

In this case, Armstrong had already paid one of his notes, and was about to pay the other when the contract on which the suit is brought was executed, and he did, in a few days thereafter, pay the other note. This contract, in its recitals, expressly says, that "when the subscriptions were made, it was understood that the subscribers should have some security for the permanent and constant maintaining and working of said railway." The appellant cannot consistently deny the truth of this recital. Armstrong was already bound to pay the money, by his promissory note. This was all that he had to do to fulfil the contract on his part. We do not see why it should be considered necessary for him to sign the contract in question. The promissory note and the agreement in question relate to the same contract, though written and executed at different dates. It is true that it is said in the contract, that it was "understood that the subscribers should have some security," but we must understand this to mean that it was so agreed. Regarding the notes, then, as showing the contract so far as it was to be performed by the parties making the donations, and the contract sued upon as showing the contract on the part of the defendant, all relating to and being evidence of the same transaction, we see no ground for the objection of want of mutuality.

As to the objection that there is no consideration, it might be sufficient, perhaps, to say that there is no answer setting up the defence. But we think a sufficient consideration clearly appears. Armstrong was interested in the making of the road, and in its being kept in use. He agreed to pay five thousand dollars toward its construction, and the company agreed to give him some security for the performance of the contract on its part by keeping up the road. Whea

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he had paid one of his notes, and was about to pay the other, the company gave him the instrument in question as the promised security, and to show the agreement on its part. He then paid the remaining note. It seems to us that the objection, so far as this ground is concerned, has nothing in it. The instrument on its face, and by its recitals, which are binding on the company, showed a sufficient consideration. We think the court committed no error in admitting the contract in evidence.

The objection to the instructions given raises no question other than those already disposed of.

As to the objection that the court erred in submitting the interrogatories to the jury, we think it sufficient to say that no question is made upon the answers made by the jury to the interrogatories by either party, and that, therefore, the interrogatories could have done the defendant no harm.

The complaint was sufficient. There was no reason, therefore, for arresting the judgment for the insufficiency of the complaint. Nor can we see that upon the whole record judgment should have been for the defendant for costs; and not for the plaintiff for the amount of the verdict.

The judgment is affirmed, with two per cent. damages and costs.

J. W. Gordon, T. M. Browne, R. N. Lamb, J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellant.

L. Barbour and C. P. Jacobs, for appellee.

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LICENSE.—Spirituos Liquors.—City Ordinance.—Constitutional Law.—A city ordinance, passed under the authority of the statute (3 Ind. Stat. 63), requiring dealers of intoxicating liquors within the city to procure a license to retail and to pay therefor, is not unconstitutional.

SAME.—Taxes.—The State may, for revenue purposes, impose a license for the

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carrying on of particular branches of business, and may confer the right upon a city, though the payment of the license fee operate incidentally as a tax upon the dealer or consumer.

SAME.—*General Law.*—That the same license fee, as a tax, is not required by all the cities in the State, is no valid objection to the law conferring the power on the common council to pass such ordinance, or to the ordinance itself; for, though taxes must be uniform throughout the city levying them, they need not be the same throughout different cities.

SAME.—*Amount of License Fee.*—The exaction, by a city, of license money in the sum of five hundred dollars of each retail dealer of intoxicating liquors, cannot be considered, as a matter of law, unreasonable or objectionably prohibitory.

APPEAL from the Judge of the Johnson Circuit Court.

WORDEN, J.—The appellant, Wiley, procured a writ of *habeas corpus* to be issued by the order of the judge below, and prayed to be discharged from the custody of the appellee, Owens, who was sheriff of the county of Johnson.

The appellee demurred to the petition, and the demurrer was sustained, exception being taken. The appellant was remanded to the custody of the appellee. He brings the case before this court for a review of the ruling below. The facts in the case are all stated in the petition, and are, in brief, as follows:

1. Wiley had a license from the authorities of Johnson county to retail intoxicating liquors at his place of business in the city of Franklin.

2. He applied to the city authorities of the city of Franklin for a license for the same purpose, and offered to make proof of his good character, etc., and offered to pay fifty dollars for a city license, but this was refused.

3. The city of Franklin had passed an ordinance requiring the sum of five hundred dollars to be paid for such city license, and inflicting a penalty for retailing in the city without such license, of not less than twenty-five dollars nor more than fifty dollars.

4. Wiley was convicted, before the mayor of the city of Franklin, of retailing in violation of the city ordinance, and upon failing to pay or replevy the judgment, he was regularly committed to the custody of Owens as such sheriff.

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The proceedings are all set out, and appear to be more regular and formal than is supposed to be usual in such cases.

Two questions are made in the cause; first, whether, on *habeas corpus*, the court or judge can go behind the commitment where the conviction is had in a court of competent jurisdiction, and discharge a party because of the invalidity of the law under which the conviction is had; second, whether or not the city ordinance in question is valid.

The conclusion to which we have come upon the latter question, renders it wholly unnecessary that we pass upon the first.

Is the city ordinance in question void? and if so, wherefore? By the act for the incorporation of cities (3 Ind. Stat. 63), it is provided that the common council shall have power to enforce ordinances "to regulate and license all inns, taverns, or other places used or kept for public entertainments; also all shops, or other places, kept for the sale of articles to be used in and upon the premises." Sec. 53, thirteenth subdivision. Section 54 is as follows: "For removal and abatement of nuisances, to carry out and enforce sanitary regulations, for the apprehension of disorderly persons, vagrants, common prostitutes and their associates, to exact license money from all persons licensed to retail intoxicating liquors by county or state authority, and to regulate all places where intoxicating liquors are sold to be used on the premises, the common council shall have jurisdiction two miles beyond the city limits."

Here is ample power conferred upon the common council to require a license to retail within the city. *The City of Lawrenceburg v. Wuest*, 16 Ind. 337.

The counsel for the appellant, however, do not insist that a city may not require a license. Their positions will be fully understood by the following statement of them in their brief. "We concede," say the counsel, "the power, in the case at bar, of the city to require a license, and, as incident thereto, to exact a license fee sufficient to cover the expense

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of issuing the same. But we contend that the ordinance, or, at any rate, the section fixing the fee at five hundred dollars, is unauthorized, illegal, and void for the reasons, first, that it is in its nature prohibitory; second, that it is unreasonable; third, that it is in conflict with the policy of the laws of the State on the subject; fourth, that the fee required is in fact a tax upon liquor dealers." We will consider the last objection to the ordinance first.

If we regard the ordinance as a revenue measure, and, therefore, as an indirect tax upon the liquor dealer, we are not advised of any constitutional objection to it as such.

To be sure, state taxes must be uniform throughout the State, county taxes throughout the county, and city taxes throughout the city. *Bright v. McCullough*, 27 Ind. 223. But city taxes need not be uniform throughout the different cities. It is sufficient if the taxes of a city are uniform throughout that city. There can be no valid objection to the law conferring power on the common council to pass the ordinance, or to the ordinance itself, on the ground of a want of uniformity.

The State may, beyond question, for revenue purposes, impose a license for the carrying on of particular branches of business. Thus, she has for nearly twenty years, by an act passed at the next session of the legislature after the adoption of the constitution, required a license for vending foreign merchandise by non-residents of the State, and for exhibiting caravans, menageries, etc. I G. & H. 424. It has never been claimed, so far as we are advised, that this act, in requiring such license, violates any provision of our state constitution. *Sears v. The Board of Commissioners of Warren County*, 36 Ind. 267.

The present act requiring a county license to retail (I G. & H. 614) seems also to be a revenue measure, imposing incidentally a tax upon the dealer, as well as a police regulation. A uniform sum is required to be paid for the license, which goes into the treasury, to be expended in the support of common schools.

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No one has ever successfully claimed that this act is void for imposing a tax upon the dealer.

If the State may thus impose a license for revenue purposes, for the carrying on of particular branches of business, no good reason is perceived why she may not confer the right to do the same thing upon municipal corporations. We are of opinion, therefore, that the statute conferring the authority upon cities to require such license is valid; and that under it, cities may require such license for revenue purposes, though it operate incidentally as a tax upon the dealer or consumer.

The statute conferring the authority in no manner limits the amount to be charged by cities for license to retail; hence any amount may be charged which may be deemed proper by the council, unless controlled by other considerations. It is urged, however, in this connection, that inasmuch as cities are empowered to raise a revenue by regular assessment and collection of direct taxes, this mode impliedly excludes any other mode of raising revenue. But it must be borne in mind that the same statute which provides for the one authorizes the other. All the provisions of the statute must be construed together. Both measures are provided for, and resort may be had to both. We are of opinion that the last objection to the ordinance is not available.

We return to the first, that the law is in its nature prohibitory.

This objection might probably be urged to any law requiring a license, however small; because any law which interferes at all with free traffic has some tendency to prohibition. We cannot say, as matter of law, that the amount required to be paid is so large as to render the ordinance void; nor can we say, in the language of the second objection, that "it is unreasonable." We pass the question whether in any case an ordinance can be held void as being unreasonable, where it is adopted in pursuance of express and un-

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limited authority. 'The amount that may be reasonably charged for a license to carry on any particular branch of business must be determined by the circumstances, and can be judged of by the common council of the city where the business is to be carried on, much better than by persons remote therefrom.

The profits of the business would, very properly, have something to do with the amount to be charged for a license to carry it on. We are not enabled to say, from any information we have on the subject, or from anything shown by the record, that the profits of the business are so small as to render the amount required, in this instance, for a license absolutely unreasonable or objectionably prohibitory.

It is urged, in support of the third objection, that the requirement by cities of so large a sum to be paid for licenses will materially diminish the revenue of the State derived from the same source. This may be, but if so, it does not render the action of cities thus had in pursuance of the statute void. The same power, the legislature, that provided for a state revenue for the benefit of common schools, to be derived from the business of retailing, also provided that cities might require a license for the same business, without limit of amount to be charged. Besides this, the act conferring the power upon cities is the last expressed will of the legislature on the subject.

We are not able to see any substantial ground on which it can be held that the ordinance in question is void. It follows that the judgment below was right, and must be affirmed.

The judgment below is affirmed, with costs.

S. P. Oyler, D. Howe, S. E. Perkins, F. J. Mattler, and S. E. Perkins, Jr., for appellant.

T. Woollen, C. Byfield, G. M. Overstreet, and A. B. Hunter, for appellee.

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THE FALL CREEK AND WARREN TOWNSHIP GRAVEL ROAD
COMPANY ET AL. *v.* WALLACE ET AL.

TURNPIKE.—Completed Road.—Assessment.—The fact that a gravel road had been completed, except one-fourth of a mile, prior to the act of May 14th, 1869 (Acts 1869, Spec. Sess. 73), is not a sufficient reason for enjoining the collection of an assessment to complete the same. That act, as well as the act on the same subject approved March 11th, 1867, was intended for the relief of roads which had been partly constructed before its passage, as well as for those which should be wholly constructed after its passage.

SAME.—Subscribers.—Assessment.—Where a portion of the persons assessed have subscribed and paid toward the construction of a gravel road, they are entitled to credits on their assessments, as the same fall due, equal to the amounts so paid, and are not required to pay their assessments until other persons assessed, not subscribers, have paid as much, in proportion, on their assessments, as such subscribers have paid on their subscriptions.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This was a suit brought by the appellees against the appellants to enjoin the collection of certain assessments made upon the lands of the appellees for the benefit of said gravel road company. There was judgment in the circuit court for the plaintiffs, and the defendants appealed. They have assigned as errors, first, the overruling of a demurrer to the complaint; and second, the refusal to grant a new trial.

The complaint alleges that the said company is, and for five years has been, a corporation, duly organized under the laws of the State, for the purpose of constructing and operating a gravel road; that the company did construct all of its road, except about one-fourth of a mile of one end thereof, and operated the same, and collected tolls thereon, for three years prior to the 18th day of June, 1869; that on that day the said company petitioned the board of commissioners of Marion county, etc., to cause an assessment of benefits to the land within the limits of one and a half miles on each side and either end of said road, as well the lands along that part of said road which was completed as the part which was not completed, under the act of 1869, for the construction and maintenance thereof, representing that said road had a good and solvent subscription of three-

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fifths of the estimated cost of said road; that the board thereupon appointed assessors, etc., who, on the 31st day of August, 1869, returned a list of the lands within said limits, as well on that part of the road which had been completed as the part thereof which had not been completed, together with their assessments against the same respectively; that the plaintiffs are severally the owners of real estate within said limits, included in said list and assessment, giving a particular description of each one's land, and the assessment thereon. The complaint then alleges that the assessment is illegal, because the statute only authorizes such assessments for the construction and maintenance of a new road, and not to reimburse parties for the cost of construction of a road already made; and the road for which said assessment was made had been constructed for four years before said assessment was asked for or made, except said one-fourth of a mile at one end thereof; and the said assessment was made on all the lands within the limits of one and a half miles on either side of the same for the entire length thereof, and on the lands within the same distance of each end thereof; that is, the said assessment was made for the construction of the whole length of the entire line of said road, as well for that portion that had been and was completed as aforesaid as for the one-fourth of a mile that was not yet completed, and on the lands on each side and each end of said whole length of line of said road between the limits aforesaid, as well along the part that had been, as along the part that had not been, completed, which, it is alleged, was an attempted fraud upon the statute; that the auditor has placed one-third of said assessment against the several tracts of land belonging to them on the tax duplicate, etc., and will continue to place the residue on the duplicate of succeeding years, if not enjoined; wherefore, etc.

The objection made to the assessment is stated in the complaint. It is, that under the act of 1869, an assessment of benefits cannot be made upon lands along a road which has been partly constructed, but only on lands along a road

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on which no work has been done. We are not of this opinion. The act in question, as well as its predecessor, the act of March 11th, 1867, was intended, we think, for the relief of roads which had been partly constructed, as well as those which should be wholly constructed after the enactment of those statutes. Indeed, it was a serious question whether the act of 1867 did not apply exclusively to companies organized prior to the passage of the act. It provided, "that any organized plank, macadamized, or gravel road company" might proceed under the act. But this court decided, in *Turner v. The Thorntown, etc., Gravel Road Company*, 33 Ind. 317, that the act applied to corporations organized after, as well as before, the enactment of the statute. The act of 1869, by its terms, applies to companies organized, or that might thereafter be organized, etc. These turnpike companies are all organized under the act of May 12th, 1852, and amendments thereto. 1 G. & H. 474. They are organized by obtaining subscriptions of stock to a specified amount and taking certain other specified steps. When an assessment has been made, and is to be collected, any person who has "subscribed and paid any such company any sum of money shall be entitled to a credit on his assessment, as the same falls due for collection, equal to the amount so paid," etc. Act of 1867, section 4; Act of 1869, section 5. No other person than one having thus subscribed and paid can be thus credited, nor can assessments be made and collected to raise money to be used for other purposes than those specified in the act. If a hundred men have been assessed, and seventy-five of them have subscribed and paid toward the construction of the road, the seventy-five do not have to pay again, in consequence of the assessment, until the other twenty-five have paid as much in proportion on their assessments as the seventy-five have paid on their subscriptions. The company cannot collect any more than enough "to construct the road and pay all legitimate expenses." Act of 1869, section 4. We think, then, that the fact that the road had all been completed, except one-fourth

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of a mile, is not a sufficient reason for enjoining the collection of the assessments made to complete the same.

The same question is discussed under the second assignment of error.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

F. E. McDonald, F. M. Butler, and E. M. McDonald, for appellants.

N. B. Taylor and E. Taylor, for appellees.

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INDICTMENT.—*Grand Jury.—Change of Venue.—Appeal.*—Upon a change of venue from one court to another, in a criminal action, where the defendant was tried upon the original indictment, which in the introductory part recited the style of the court, the name of the county and state, the time and place of the meeting of the court, the names of the parties, and that the grand jurors, of the proper county, good and lawful men, duly and legally empanelled, charged and sworn to inquire, etc., and, where the record showed that said indictment was returned into open court by such grand jury; *Held*, that it sufficiently appeared that the indictment was found by a legal grand jury.

APPEAL from the Franklin Circuit Court.

BUSKIRK, C. J.—The appellant was indicted at the September Term, 1870, of the Dearborn Circuit Court for murder and as an aider and abettor of McDonald Cheek in the murder of Thomas Harrison, in the said county of Dearborn.

Upon the application of the appellant, the court, at said term, changed the venue of said cause from the Dearborn to the Franklin Circuit Court.

At the May Term, 1871, of the Franklin Circuit Court, the appellant was tried, convicted, and sentenced to the penitentiary for and during his natural life. The court over-

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ruled motions for a new trial and in arrest of judgment, to which rulings the appellant excepted.

The only error assigned and argued by counsel for appellant is based upon the action of the court in overruling the motion in arrest of judgment.

It is maintained, with great earnestness, that the transcript of the record and proceedings of the Dearborn Circuit Court, which was filed in the Franklin Circuit Court, was fatally defective, and did not confer jurisdiction on that court to try the appellant. The objection urged to the transcript is, that it does not show that there was a grand jury in the Dearborn Circuit Court duly empanelled, sworn, and charged, by whom the indictment against the appellant was found and returned into open court, signed by the foreman a "true bill."

The transcript filed in the Franklin Circuit Court contains the following entries in the record of the Dearborn Circuit Court:

"Pleas begun and held at the court-house in the city of Lawrenceburgh, in and for the county of Dearborn, and State of Indiana, before the Hon. Robert N. Lamb, judge of the twenty-sixth judicial circuit of the State of Indiana, of which the county of Dearborn forms a part, it being the September term of said court, in the year of our Lord, one thousand eight hundred and seventy, A. D., 1870.

"The State of Indiana v. Omer T. Bailey. Murder in first degree and aiding and abetting murder in the first degree.

"Be it remembered that on the 14th day of September, 1870, it being the third judicial day of the September term, 1870, of said court, the following proceedings were had in the above entitled cause:

"The State of Indiana v. McDonald Cheek and Omer T. Bailey. Confined in jail on charge of murder in first degree.

"It appearing to the satisfaction of the court that the Dearborn county jail is insufficient for the safe keeping of the defendants, Cheek and Bailey, and their personal security, it is ordered by the court that said prisoners be removed to

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the jail of Jefferson county, Indiana, and there detained for their safe custody, subject to the order of this court.

"And afterward, to wit, on the 22d day of September, 1870, it being the tenth judicial day of the September Term, 1870, of said court, the following further proceedings were had in said court, to wit:

"The grand jurors now return into open court, as true bills, indictments numbered 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, and 360, duly indorsed by their foreman, and having further business to transact, retire to their room."

Then follows an order for the sheriff of said court to proceed to the jail of Jefferson county, and procure and bring into court the said prisoners, McDonald Cheek and Omer T. Bailey. Then appears the following entry, namely:

"And afterward, to wit, on the 29th day of September, 1870, the same being the sixteenth judicial day of the September Term, 1870, of said court, the following further proceedings were had in said cause, to wit:

"Now comes William W. Tilley, Esq., prosecuting the pleas of the State in this behalf, and said defendant, in his own proper person, comes also, and being arraigned in open court, says that he is not guilty, as charged in the indictment herein."

Then follows an entry showing an application on the part of the defendant, supported by affidavit, to the court, for the appointment of counsel to make the defence of the defendant, and the appointment by the court of Noah S. Givan as such counsel.

Then follows an entry showing an application on the part of the defendant, supported by affidavit, for a change of the venue of said cause from Dearborn county, and an order of the court changing the said venue to the county of Franklin.

It is further shown by the record that there was filed in the clerk's office of the Franklin Circuit Court, on the 4th day of November, 1870, the original indictment in this cause,

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the commencement of which was in the words and figures as follows:

"The State of Indiana, Dearborn county, Dearborn Circuit Court, September Term, 1870. The State of Indiana v. Omer T. Bailey. Murder in the first degree and aiding and abetting murder.

"The grand jurors of Dearborn county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged, and sworn to inquire into felonies and misdemeanors, in and for the body of said county of Dearborn, in the name and by the authority of the State of Indiana, on their oath present that one Omer T. Bailey, late of said county, on the 6th day of September, A. D. 1870, at and in the county of Dearborn, and State of Indiana, did," etc.

The first count of said indictment charged the appellant with the murder of Thomas Harrison, and the second count charged the appellant with aiding and abetting one McDonald Cheek in the murder of the said Harrison.

"And upon the back of said indictment is indorsed the following, to wit: 'No. 346. A true bill. R. D. Brown, foreman. Filed and presented in open court, September 22d, 1870.

JOHN E. CONWELL, Clerk.'

The real and substantial objection urged to the transcript by the appellant is, that it does not contain an entry upon the records of the Dearborn Circuit Court, showing that a grand jury was empanelled, sworn, and charged to inquire and true presentment make, etc. It is earnestly maintained that, without such an entry, the Franklin Circuit Court possessed no power or jurisdiction to place the appellant upon trial for the crime charged in said indictment; and in support of such position, counsel for appellant refer to many English authorities, and to the following decisions of this court: *Sawyer v. The State*, 17 Ind. 435; *Conner v. The State*, 18 Ind. 428; *Jackson v. The State*, 21 Ind. 171; *Hall v. The State*, 21 Ind. 268.

It was decided in *Sawyer v. The State, supra*, that on appeal to this court the record must show the empanelling

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of the grand jury, and that otherwise a charge by authority does not appear. For such omission the judgment was reversed.

In *Conner v. The State, supra*, the same point was decided, with the additional one, that the record must show that the indictment was returned and filed in court.

In the cases of *Jackson v. The State* and *Hall v. The State, supra*, this court decided the same questions as were decided in *Conner v. The State*.

It is maintained by the appellee, that whatever may have been the practice and rule of decision in England, it is not necessary, in this State, that the record on a change of venue, or on appeal to this court, should show the impanelling of the grand jury; but that, conceding that it is necessary that the record show such fact, it is sufficiently shown by the record in this cause. The counsel for the appellee have referred us to numerous authorities bearing upon the question; but great reliance is placed upon the case of *Alley v. The State*, 32 Ind. 476.

The case of *Alley v. The State, supra*, holds that it is not necessary, on appeal to this court, that the record should show the impanelling of the grand jury, and expressly overrules the case of *Sawyer v. The State, supra*, and all the subsequent cases following the ruling in that case.

FRAZER, J., in delivering the opinion of the court in the above cited case, says: "The cases mentioned above refer us to no authority whatever in support of the proposition which they announce. Nor is the reason given, viz., that a charge by authority does not otherwise appear against the accused, very satisfactory. It has an easy answer, in this, that the court below may be supposed to know its own grand jury, and that when its record declares that the grand jury returned into court as a true bill the indictment in a given case, it leaves no room for the inference that possibly the indictment was not found by a grand jury. It is out of our power to conceive of any reason requiring the record of each criminal case to show, at length, the impanelling of

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the grand jury, which would not equally require that it show the commission and oath of the prosecuting attorney who is required to sign the indictment. We have searched the books in vain for authority or *dicta* requiring it or practice sanctioning it, and we think it is wholly without support in the law; and it is certainly a requirement having no tendency to promote the correct administration of criminal justice."

While we agree with the conclusion reached in the above case, we are satisfied that the learned judge who delivered the opinion of the court was mistaken when he said that there was no authority to support the previous rulings of this court. It is the uniform practice in England, and in several of the American states, for the caption of the indictment to show the impanelling of the grand jury.

There is a reason for the rule and practice in England that does not exist in this or many of the other states. In England, the indictment is found in an inferior court of limited jurisdiction, when the case is transferred to a superior court for trial; so it was necessary that the caption of the indictment should show that a grand jury had been impanelled in the inferior court, competent to make the presentment, as nothing could be presumed in favor of the jurisdiction of the inferior court; but in this State, and in the most of the other states, where the indictment is found in a court of general jurisdiction, in favor of which the most liberal presumptions are indulged, and where the case is usually tried in the court where the indictment is found, there is no valid reason for adhering to the English practice. Where the reason of a rule ceases, the rule itself should cease.

The caption constitutes no part of the indictment in England. It was an entry made by the clerk, showing the meeting of the court, who composed the court, and the names and qualifications of the grand jurors, and that they were impanelled and sworn. It is now no longer necessary that it should contain the names or qualifications of the jurors. The caption always was and is subject to amendment.

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We think it may be regarded as settled, both on principle and by authority, that it should be shown in the record that the indictment was found by a grand jury which was duly impanelled and sworn; but we regard it as equally well settled, that it need not be shown, by an entry made by the clerk and entered on the minutes of the court at the beginning of the term, when the grand jury is impanelled and sworn. If the fact is made to appear anywhere in the record, it will be sufficient.

The record shows that the grand jury returned the indictment into open court. The indictment is signed by the prosecuting attorney, and indorsed by the foreman as "a true bill." The defendant was arraigned in the Dearborn Circuit Court, and for plea said that he was not guilty as charged in the indictment.

It is provided by section 53 of the criminal code, 2 G. & H. 400, that "the first pleading on the part of the State is either an indictment or information."

The first clause of section 54 of said act provides, that "the indictment or information must contain: First. The title of the action, specifying the name of the court in which the indictment or information is presented, and the names of the parties."

Section 61 of said act provides that no indictment or information may be quashed or set aside for any of the following defects: * * * * "Fifth. For an omission to allege that the grand jurors were impanelled, sworn or charged."

Section 68 of said act reads as follows:

"Sec. 68. Every indictment must be recorded by the clerk during the term at which the same is found, in a book to be kept for that purpose. The judge must compare the record with the original indictments, and certify the correctness thereof. In case the original indictment is lost or destroyed, the defendant may be tried upon a copy taken from the record and certified by the clerk, without any delay from that cause." 2 G. & H. 405.

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The last clause of said section is modified by an act approved January 30th, 1852, 2 G. & H. 428.

By the above section, the indictment becomes a record, and is evidence of the finding and contents thereof. *Wall v. The State*, 23 Ind. 150.

The commencement of the indictment contains the title of the action, the name and term of the court where it was presented, and the names of the parties. It also contains the following averments: "The grand jurors of Dearborn county, in the State of Indiana, good and lawful men, duly and legally impanelled, charged, and sworn to inquire into felonies and misdemeanors, in and for the body of the county of Dearborn, in the name and by the authority of the State of Indiana, upon their oath present," etc.

The clerk of the Franklin Circuit Court certifies that the original indictment was filed in his office. It was held by this court, in *Doty v. The State*, 7 Blackf. 427, that upon a change of the venue from one county to another, in a criminal cause, the filing of the original indictment in the office of the clerk of the court of the county to which the change was granted, authorized such court to exercise jurisdiction over the cause.

There seems to be great confusion in the books as to what is meant by the caption of the indictment, and the difference between the caption and the introductory part or commencement of the indictment.

Bishop, in his work on Criminal Procedure and Practice, vol. I, sec. 146, in speaking of the English practice, says: "What is called the caption may be explained as follows: Says Starkie,—'Where an inferior court, in obedience to a writ of *certiorari* from the King's Bench, transmits the indictment to the crown office, it is accompanied with a formal history of the proceedings, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the crown office. The history of the pro-

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ceedings, as copied or extracted from the schedule, is called the Caption, and is entered of record immediately before the indictment.' The caption, therefore, in the case pointed out by Starkie, first appears in the Court of Queen's Bench, being made up by the clerks of this court from the schedule transmitted from the lower tribunal. Says Dickinson, treating of the practice of the quarter sessions, 'It is not put on the files of the court of quarter session, and is annexed only on removal.'"

The same author, in sec. 149, says: "In the United States, there are some variations of practice. In several of the states the same course is in substance pursued as in England; and the same names are employed to designate the different parts of the indictment and of the record. But in other states the part of the indictment termed the commencement is expanded to somewhat greater length, and is called the caption, serving, it would seem, the double purpose of the English commencement and the English caption. And there are still other states in which this matter appears not to be very well settled, or at least very clear."

What is meant by the phrase "English commencement," is explained by this author in section 145, where it is said: "We have already seen that it is customary, in England and in this country, to write the name of the county, and sometimes also the name of the state, in the upper margin of the indictment. Next to the name of the county follow, in English practice, the words: 'The jurors for our lady the queen on their oath present, that,' etc. This matter seems to be termed, in the English books, if it has a name, the commencement; it is never called the caption."

This author, in section 154, says: "Indeed, the whole question as to what the caption should contain, appears, when approached through the American books, draped in mist and girded about with darkness. Doubtless the nature and general jurisdiction of the tribunal is to be considered; also the peculiarity of its local jurisdiction, if it is a court of the latter sort; also the statutes and judicial usage of

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the particular state. The reader will find some help from consulting the collection of points here appended in a note; but, it must be observed, the reports themselves do not always disclose, whether the caption spoken of is in the nature of the English caption, or whether it is the introductory matter found at the head of the indictment as returned by the grand jury."

In 1 Wharton American Criminal Law, sec. 219, it is said: "The caption is no part of the indictment; its office is to state the style of the court, the time and place of its meeting, the time and place where the indictment was found, and the jurors by whom it was found."

As has been shown, our statute requires that the above things shall be contained in the indictment, and not in what is known in England as the caption. Our statute conforms to the definition given above by Bishop, of "the introductory matter found at the head of the indictment, as returned by the grand jury."

It is conceded by counsel and shown by the elementary writers and in the adjudged cases, that it would be sufficient if the clerk had stated in the minutes of the court, that "the grand jury was empanelled, sworn, and charged." We are unable to see why the same facts may not be shown by averments in the indictment itself, which is made by our statute a record, and is evidence of the facts recited therein. Is not the finding of the grand jurors, in the indictment, that they were empanelled, sworn, and charged, entitled to as much weight and consideration as the entry made by a mere ministerial officer?

We have made a very careful and general examination of the American decisions on this point, and are entirely satisfied that they establish the proposition, that where the introductory part of the indictment shows the style of the court, the name of the county and state, the time and place of the meeting of the court, the names of the parties, and is followed by the statement that "the grand jurors of — county, in the State of Indiana, good and lawful men, duly

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and legally empanelled, charged, and sworn to inquire," etc., it sufficiently appears that the indictment was found by a legal grand jury, when the record shows that the indictment was returned into open court by such grand jury.

It was held by the Supreme Court of Missouri, in *The State v. England*, 19 Mo. 386, that an indictment commencing thus: "State of Missouri, county of Hickory, in the Hickory Circuit Court, September term, A. D. 1852. The grand jurors for the State of —, empanelled, charged, and sworn to inquire," etc., sufficiently showed that the indictment was found by a competent and legally organized grand jury.

In *The State v. Conley*, 39 Maine, 78, it was held, that an indictment in this form: "State of Maine, Cumberland, ss: at the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-four. The jurors for said state, upon their oaths present," was sufficient, and showed that the indictment was found by a legal grand jury. The court observed: "The caption is conformable to general, if not universal, practice in this and other states.

It was held, in *Commonwealth v. Edwards*, 4 Gray, 1, that where an indictment which purports, by its caption, to have been found at a court of common pleas for the county of Hampshire, and then it adds, "the jurors for said commonwealth, on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire. In the above case there was no other caption than that contained in the introductory part of the indictment.

It was held in *The State v. Freeman*, 21 Mo. 481, that an indictment reciting that the grand jurors were empanelled, sworn, and charged, "need not state when and where they were so empanelled, sworn, and charged."

It would render this opinion unnecessarily long to quote from all the decisions we have examined, and which conform, in substance, to the rulings in the above cases, but we refer to such cases. *Reeves v. The State*, 20 Ala. 33; *Duncan v. The*

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People, 1 Scam. 456; *Commonwealth v. James*, 1 Pick. 375; *Commonwealth v. Colton*, 11 Gray, 1; *Thomas v. The State*, 5 How. Miss. 20; *Byrd v. The State*, 1 How. Miss. 163; *Vaughn v. The State*, 4 Mo. 530; *Young v. The State*, 6 Ohio, 435; *Mackey v. The State*, 3 Ohio St. 362; *The State v. Williams*, 2 McCord, 301; *Barnes v. The State*, 5 Verg. 186; *The State v. Nixon*, 18 Vt. 70; *The State v. Gilbert*, 13 Vt. 647; *The State v. Thibeau*, 30 Vt. 100; *The State v. Freeman*, 15 Vt. 723.

A grand jury is an essential and component part of the circuit court in each county, where there is no criminal court, in which case a grand jury composes a part of that court. The statute prescribes the number, qualifications, mode of selection, empanelling, and the powers and duties of grand jurors.

We are bound to presume, until the contrary is affirmatively shown, that public officers have performed the duties imposed on them by law. The transcript shows the time and place of the meeting of the court; that the grand jury returned into open court the indictment against the appellant; that he was arraigned and plead not guilty; that the original indictment was filed in the Franklin Circuit Court, and that the appellant was placed on trial on such original indictment. The indictment itself shows that the grand jury was duly and legally empanelled, sworn, and charged.

We entertain no doubt that it is sufficiently shown that the court in which the indictment was found, and the one in which the appellant was tried, had full and complete jurisdiction of the cause. To hold otherwise, would greatly impede and seriously embarrass the just and prompt administration of the criminal laws of the State. This we are unwilling to do, and especially where the substantial rights of the accused have not been jeopardized.

The judgment is affirmed, with costs.

T. B. Adams, F. Berry, and N. S. Givan, for appellant.

B. W. Hanna, Attorney General, *M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman*, for the State.

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STATUTE.—*Title of Act.—Bank of the State.—Municipal Taxes.*—The following title: "An act to provide for the assessment and collection of taxes on the shares of stock owned in banks and banking associations doing business in this State," is sufficient to cover this provision in the act: "Nothing in this or any other act shall be so construed as to authorize the taxation of stock in the Bank of the State of Indiana, or any national bank, for municipal purposes." Acts 1867, p. 216.

CITY OF EVANSVILLE.—*National Banks.—Municipal Taxes.*—This provision applies to the city of Evansville, acting under a special charter, which is modified by the provision in the charter of the Bank of the State exempting its capital stock from municipal taxation, and by said provision of said act of 1867, so that such city now stands, in this respect, on an equality with the other cities of the State, and it cannot tax the shares of the capital stock in a national bank for municipal purposes.

STATUTES.—*Repugnant Provisions.*—Where two statutes are clearly repugnant to each other in their provisions, the later must be regarded as having superseded the former.

APPEAL from the Vanderburg Common Pleas.

DOWNEY, J.—The legal question involved in this case arises out of the following statement of facts presented to the common pleas:

"That the city of Evansville is organized and acting as a municipal corporation, under an act of the General Assembly of the State of Indiana, passed January 27th, 1847 (Local Acts, 1847, 3); that said plaintiff has resided, for the last five years, and still resides, within the corporate limits of said city; and that during all that time he has been, and still is, the holder of four hundred shares of the capital stock of the Evansville National Bank, of Evansville, Indiana, of the par value of one hundred dollars per share; that said Evansville National Bank is a bank duly organized under the act of congress, entitled, 'An act to provide for a national currency by a pledge of public stock,' usually known as the 'National Currency Act,' approved June 3d, 1864; that prior to the first day of June, to wit, on the first day of May,

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1871, one Morris Hanff, who was then and there city assessor, duly elected, qualified, and acting as such, placed four hundred shares of the stock of said bank upon the assessment roll of said city, and assessed the same thereon to the said plaintiff, for taxation, as personal property, and appraised the same at their par value, to wit, forty thousand dollars; that afterward, in accordance with the charter and ordinances of said city, said assessment of said shares of stock was duly transferred to the tax duplicate of said city for taxation, for the year 1871; and that thereupon, at the proper time, to wit, on the 20th day of June, 1871, the common council of said city, in due form, levied upon all the real and personal property found upon said duplicate, for said year, an *ad valorem* tax of three-quarters of one per cent.; that thereupon the clerk of said city, in pursuance of the charter and ordinances of said city, placed upon said tax duplicate said levy upon said stock, whereby the plaintiff became duly charged, upon said duplicate, with three hundred dollars, as and for the tax for the year 1871, upon said four hundred shares of stock in said bank; that thereupon, in due time, to wit, on the first day of September, 1871, said duplicate was duly delivered to the defendant, Koch, who was then and there, and still is, the collector of said city, and the same was accompanied by the proper precept; and that if said tax is properly levied, and lawfully collectible, the same is now due; and that by the charter and ordinances of said city, said collector now has the right to collect all taxes levied for said year, upon personal property, by distress and sale.

"It is further agreed that said Koch, as said collector, is threatening, and is about to seize the plaintiff's property, and sell the same for the payment of said tax.

"And it is further agreed that if the court shall be of opinion that said shares of stock are not liable to be taxed by said city, there shall be a decree enjoining the defendants from collecting said sum of three hundred dollars, so levied upon said stock.

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"But if the court shall be of opinion that said city had a lawful right to levy and collect said tax upon said shares of stock, then said court shall render judgment for defendant."

Upon the submission of this agreed statement, the court found for the plaintiff, and, over a motion for a new trial, rendered a decree perpetually enjoining the defendants from the collection of the tax.

It is not insisted that such taxation by cities acting under the general law for the incorporation of cities is allowed, but it is contended that the city of Evansville, under its special charter, can exercise that power. The following part of the charter is cited by counsel for both parties, and if it stood alone, it seems to be conceded by counsel for the appellee, it would authorize such taxation.

"For the purposes of revenue, the common council shall have the power to levy and cause to be assessed and collected once in each year an *ad valorem* tax upon all the property real and personal within said city, and on all money and capital within said city which is or may be subject to taxation for county purposes, whether such money or capital be actually employed or not, and on all money bearing interest and payable to any inhabitant of said city, and also a poll tax. * * * Provided, that such *ad valorem* tax shall not exceed three-fourths of one per cent. upon the value of the property, capital, or money taxed."

It is claimed by counsel for the appellants that the legislation by the State, and by the United States, by which the taxation of the shares of bank stock for municipal purposes is prohibited, has not made any change in the charter of the city of Evansville, or its power to tax such property. The exemption of such stock from taxation, whatever may be said as to its policy, rests upon these enactments. When the bank of the State of Indiana was incorporated, the legislature inserted in its charter this provision:

"The capital stock of said bank shall be subject to the same rate of taxation for state and county purposes as the property or stock of other moneyed corporations, and the

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real estate and other property of said bank and branches situated in any city or town shall be taxed for municipal purposes in the same manner as other property so situated; but the capital stock of said bank or branches shall not be taxed for municipal purposes."

When the act of Congress, under which the national banks are organized, was passed, in order that the states might not discriminate against such banks in the exercise of the power of taxation, this provision was inserted in the act, after providing for the collection of certain specified taxes from such banks:

"Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. Provided, further, that the tax so imposed under the laws of any state upon any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. Provided, also, that nothing in this act shall exempt the real estate of such association from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

Reference is made to the act of March 15th, 1867, relating to the assessment and collection of taxes on the shares of stock owned in banks and banking associations doing business in this State, Acts 1867, p. 216, and especially to the ninth section thereof, which reads as follows:

"Nothing in this, or any other act, shall be so construed as to authorize the taxation of stock in the bank of the State of Indiana, or in any national bank, for municipal purposes."

It would seem that the legislature, in the enactment of this

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statute, regarded the provision in the charter of the bank of the State, and the clause in the act of Congress above set out, as creating an exemption, and that the ninth section of the act of 1867 was designed to carry out or conform to that idea. It is objected to the ninth section of this last act, that it is not embraced in the title of the act, and is, therefore, unconstitutional and void. It is said by counsel for the appellant: "The very evil the constitutional section sought to avoid is here perpetrated. In the body of an act ostensibly providing for taxation, an exemption from taxation is ingeniously injected, and thus, without attracting the attention of the legislature, the objectionable section is smuggled through. The title of the act related only to taxation, and by every rule of construction applied only to state and county taxation."

The title to the act is as follows: "An act to provide for the assessment and collection of taxes on the shares of stock owned in banks and banking associations doing business in this State."

We are of the opinion that the title of the act is sufficient to cover the provisions made by the ninth section. We are also of the opinion that the legislation in question must be held to apply to the city of Evansville as well as to cities acting under the general law. The special charter of the city was, by the present constitution, continued in force until such time as the General Assembly should, in its discretion, modify or repeal the same. We must hold that the legislation in question was intended to and did so modify the charter, that that city now stands, in this respect, on an equality with the other cities of the State. The law does not favor repeals by implication, but requires clearly repugnant language to effect a repeal. If, however, two statutes be clearly repugnant to each other in their provisions, the later must be regarded as having superseded the former.

¹ Davis Ind. Dig. 774, secs. 50-51.

We are of the opinion that it is the shares of the capital stock which the legislation above referred to exempts from municipal taxation. The capital stock of such national

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banks is by the act of congress expressly required to be divided into shares of one hundred dollars each, and these shares are owned by the stockholders or shareholders. They represent the property or wealth of the corporation. But notwithstanding this, it is expressly provided by the act of congress that nothing in the act shall exempt the real estate of such association from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed. The state law of 1867 follows out the same idea, that the shares of the capital stock represent the whole property or wealth of the corporation, by providing for taxation of the shares. But as the real estate of the bank is taxed, as such, in the name of the corporation, it is provided in the eighth section of the act, that in making the assessment and ascertaining the value of any shares of bank stock under the provisions of the act, it shall be lawful to deduct from the gross cash value of such shares the proper proportionate part of the value of any real estate held or owned by any such bank or banking association in this State, and taxed under the laws thereof, in which any part of the capital stock of such bank or banking association may be invested; and in making such deduction, the value of such real estate for taxation shall be the criterion. But that part of the capital stock of the bank which is invested in real estate would seem not to be exempt by the act of congress from municipal taxation, whatever may be the effect of the state legislation on the subject. But perhaps this question is not in the case before us.

The judgment is affirmed, with costs.

C. Denby and D. B. Kumler, for appellants.

A. Iglehart, W. F. Parrett, L. Wood, and F. E. Iglehart, for appellee.

Kemp *v.* Willson.

THE JEFFERSONVILLE RAILROAD COMPANY *v.* WAGONER ET AL.

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—This case involves the same question decided by the court in the case of *The Jeffersonville Railroad Company v. Weinman*, *ante*, p. 231, and for the reasons there given must be affirmed.

The judgment is affirmed, with costs.

G. V. Howk, W. W. Tuley, and C. D. Howk, for appellant.

KEMP *v.* WILLSON.

APPEAL from the Howard Common Pleas.

DOWNEY, J.—The appellee sued the appellant, and had final judgment in his favor. The defendant appealed to this court, and has assigned as errors the overruling of his demurrer to the complaint, the sustaining of a motion made by the plaintiff to strike out part of his answer, the sustaining of the demurrers of the plaintiff to the first, second, third, fourth, and fifth paragraphs of his answer, and the refusal to grant him a new trial. But the transcript contains none of the original papers, being made up of the entries on the order book only. None of the evidence is in the record. In their brief, counsel for the appellant say, they hope they will be able to procure a perfect record, but they have not done so. The clerk says the original papers are not on file in his office. We can decide nothing upon such a record.

The judgment is affirmed, with ten per cent. damages and costs.

E. Chapman and H. A. Brouse, for appellant

M. Bell and A. S. Bell, for appellee.

Nash *v.* Caywood.

NASH *v.* CAYWOOD.

PRACTICE.—Special Finding Without Request.—A special finding will not be regarded as having been made under section 341 of the code, unless it appear to have been made at the request of one of the parties to the action, and it will be treated as nothing more than a general finding.

CONTRACT.—Rescission.—Where personal property is sold, and notes of a firm in which the vendor is a partner surrendered to him in payment, and by a subsequent contract between the vendor and his firm, the notes are cancelled, and afterward, the partnership having become bankrupt, the contract of sale is rescinded, and also the contract between the vendor and the firm, and the purchaser under the contract of sale agrees to file a claim against the estate of the bankrupt partnership, which one partner agrees to see paid if he lives, the rescission of the contract of sale is complete, although the notes delivered by the purchaser have not been returned to him, they having been destroyed.

APPEAL from the Hendricks Common Pleas.

DOWNEY, J.—Action by the appellant against the appellee to recover the possession of certain personal property, of which it is alleged that the plaintiff is the owner and entitled to the possession, and which he charged the defendant unlawfully detained from him, possession of which was demanded by him, and fifty dollars damages for the detention thereof.

The answer was, first, the general denial; and, second, property in the defendant and not in the plaintiff. Reply to the second paragraph in denial thereof. The cause was tried by the court, and there was a special finding, but it does not appear to have been made at the request of the parties or either of them. The court also stated its conclusions of law upon the facts found, but there was no exception to them. The plaintiff moved the court for judgment in his favor upon the special finding, but his motion was overruled, and he excepted. He then moved the court to grant him a new trial, and this motion was also overruled, and final judgment rendered for the defendant.

The errors assigned in this court are:

First. That the special findings are contrary to the evidence.

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Second. The refusal to render judgment for the plaintiff on the special findings.

Third. The overruling of the plaintiff's motion for a new trial.

We cannot regard the special finding as having been made in accordance with section 341 of the code, because it does not appear to have been made by the request of the parties, or either of them, but must regard it as nothing more than a general finding. The facts are, that in January, 1870, Caywood purchased of Nash two horses, the property in question, for three hundred dollars, which he paid by the transfer to Nash of a note on one Potts, for twenty-seven dollars, a note for one hundred dollars on G. W. Nash & Brother, and the balance it was agreed should be paid in the note of Nash & Brother for one hundred and seventy-five dollars. On the same day Nash, the plaintiff, purchased of Nash & Brother another pair of horses, spoken of as "the mill team," in payment for which he surrendered to them the account and notes received from Caywood, which were then cancelled and torn up, the amount of the note of Potts being charged to him in his account with Nash & Brother. Soon after this Nash & Brother became bankrupt, and it became a question whether the sale by them of the mill team to Nash was valid or not. The plaintiff, the defendant, and George Nash, a member of the firm of Nash & Brother, met and agreed that both sales should be rescinded; that the plaintiff should have his horses back that he had sold to Caywood; that he should give up to the assignee in bankruptcy the mill team, and that Caywood should file a claim against the bankrupts' estate for the amount of the debts against them which he had transferred to Nash for the horses, including the amount of the note of Potts, George Nash promising, if he lived, to see the claim paid. The horses in question, according to this agreement, were redelivered by Caywood to Nash, and the mill team surrendered to the assignee in bankruptcy.

A few days after the redelivery of the horses, the defend-

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ant demanded the return of the horses or the note of the plaintiff, or of George Nash, which being refused, he went to the field, where the horses in question were being used by a hired hand of the plaintiff, and took the horses away from him. The plaintiff brought this action to recover the possession of them.

It appears that the judge of the common pleas was of the opinion that the agreement for the redelivery of the horses in question was without consideration, because the note and account in favor of Caywood against Nash & Brother, and the note of Potts, were not returned to Caywood at the time of the rescission. In this we think the court was in error. These papers had been destroyed, and hence could not have been returned, if such had been the contract. But it was no part of the contract that they should be returned, and it was not therefore necessary to return them if it had been possible. Caywood agreed to present a claim for the amount against the estate of Nash & Brother in bankruptcy, and that firm agreed, through George Nash, one of its members, that he should have such claim against them, and that he would see that it was paid, if he lived. There was no ground on which Caywood could demand the note of Nash, the plaintiff, for it was no part of the contract that he should have such note, nor was there any ground on which he could require the note of George Nash for the amount, for the same reason. He had agreed to look to the estate of the bankrupts for his pay, with the individual assurance of George Nash that the claim should be paid, if he lived. He got from the plaintiff what he agreed to take, and he should not demand anything more or different. The plaintiff gave up the "mill team" to the assignee, which he probably would not have done, but for the return to him of the horses in question.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

L. Ritter, for appellant.

The Columbus, Chicago, and Indiana Central Railway Company *v.* Brownlee.

WINSHIP *v.* WINSHIP ET AL.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—The appeal in this case must be dismissed without any decision upon the questions which counsel present. There were three defendants to the action in the common pleas, and the judgment was against all of them. One only of them appeals, and, without complying with section 551, p. 270, 2 G. & H., submits the cause. Cases have so frequently had to be dismissed for this reason, that it seems to us that counsel should see the necessity of giving attention to this point. The clerk's certificate to the transcript is not authenticated by affixing the seal.

The appeal is dismissed, with costs.

Jones, Miller & Stallard, Wallace & Hiett, and C. A. Ray,
for appellant.

W. D. Lee and P. H. Lee, for appellees.

THE COLUMBUS, CHICAGO, AND INDIANA CENTRAL RAILWAY
COMPANY *v.* BROWNLEE.

APPEAL from the Grant Common Pleas.

BUSKIRK, C. J.—The record in this cause was filed July 27th, 1870. At the November Term, 1870, it was continued. On the 29th day of May, 1872, the appellee moved the court to dismiss the appeal because there is no assignment of errors, and that the appellant has failed to prosecute his appeal. We have examined the record, and find that there is no assignment of errors; that no process has been taken out; and that no brief has been filed by the appellant.

The appeal is dismissed, at the costs of the appellant, and the clerk is directed to certify this dismissal immediately to the court below.

E. Walker, for appellant.

J. Brownlee and H. Brownlee, for appellee.

Hoffman et al. v. Zollinger.

HOFFMAN ET AL. v. ZOLLINGER.

Set-Off.—Promissory Note.—Assignment.—Mutuality.—In an action by the assignee of a note, not payable in bank, the defendant may set off a joint note made by the payee of the note sued on, as principal, for his individual debt, and by another as his surety, and held by the defendant as assignee thereof before notice of the assignment of the note sued on.

APPEAL from the Elkhart Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellants upon a promissory note executed by the defendants, payable to the order of Jacob Ulery, and indorsed by the payee to Hawks Bros. & Co., the plaintiff being the alleged owner of the note. Issue, trial by jury, verdict and judgment for the plaintiff.

The defendants answered, setting up several matters of set-off, and amongst them a joint note, executed by Ulery and Jacob Hanes, payable to the order of Isaac Dean, and by the payee indorsed to the defendants, as was alleged, before the bringing of the suit, and before they had any notice of the assignment of the note, on which the suit was brought. The note thus pleaded as a set-off was alleged to have been executed by Ulery as principal, and for his individual debt, and to have been signed by Hanes merely as his surety. This portion of the defendants' answer, on motion of the plaintiff, was stricken out, on the ground that the note thus pleaded could not be set off against the plaintiff's claim. Defendants excepted. This ruling is the subject of the first assignment of error.

By our statute, a promissory note not payable in a bank in this State may be transferred by indorsement, but such transfer cannot defeat a set-off which the maker may have acquired against the payee or any assignor before notice of the assignment. 2 G. & H. 658, sec. 3.

Therefore the case stands, under the allegations of the pleading, as if Ulery himself were suing upon the note executed by the defendants, the transfer not defeating the set-

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off if the defendants could have successfully set it up as against him.

The note pleaded as a set-off is alleged to have been given for the debt of Ulery, and to have been executed by him as principal and the said Hanes as surety, and the question arises whether there is such a want of mutuality as will prevent the set-off.

The general principle of law is, that mutual debts only can be set off against each other. Hence the sole debt of one cannot be set off against the joint debt of two or more, nor *vice versa*.

But there are cases which, in effect, hold that the debt of a principal, although there are sureties thereupon, may, for the purposes of set-off, be regarded as the sole debt of the principal. *Hanson, Ex parte*, 18 Ves. 232. In this case, it was said, that "the joint debt was nothing more than a security for the separate debt; and upon equitable considerations a creditor, who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was a security." See also *Malurin v. Pearson*, 8 N. H. 539; *Concord v. Pillsbury*, 33 N. H. 310; *Andrews v. Varrell*, 46 N. H. 17. In the latter case, the court say: "Although, by our statute, proper matters for set-off are mutual demands only, * * * yet it is not considered as conflicting with this rule to set off a note signed by a principal and his surety, against a note running to such principal alone; the debt in such case being considered the debt of the principal." See, further, 2 Story Eq. Jur., sec. 1437.

We have the following statutory provision: "In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant." 2 G. & H. 89, sec. 58.

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The case before us is not within the letter of the statute above set out, but is clearly within its spirit, and must be governed by it. If the parties had been reversed; that is to say, if the defendants herein had sued Ulery and Hanes upon the note which is attempted to be set off in this case, then Ulery, he being still the holder of the note herein sued upon, could have set the same off in the supposed action against himself and Hanes. That would have been a case strictly within the letter of the statute. We cannot, for a moment, suppose the legislature intended that the question whether two given claims might be set off against each other should depend upon the circumstance of one, and not the other, being sued upon. We conclude, therefore, that if Ulery, instead of his assignees, had brought this action, the note offered as a set-off would have been a proper subject of set-off. The case, we have seen, is not changed by Ulery's transfer of the note sued upon. His assignee stands in his shoes in this respect. We are of opinion, therefore, that the court erred in striking out this item of set-off.

This conclusion renders it unnecessary to examine the errors assigned in relation to subsequent steps in the cause.

The judgment below is reversed, with costs, with leave to the parties to amend their pleadings.

A. S. Blake and R. M. Johnson, for appellants.

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HEFFREN v. JAYNE ET AL.

ATTORNEY.—Client.—Bankruptcy.—An attorney, in transactions with his client, acts in a fiduciary capacity, and under section 33 of an Act of Congress, entitled "An act to establish a uniform system of bankruptcy," etc., approved March 2d, 1867, the collection of money by him for his client creates a debt which an adjudication of bankruptcy against him does not discharge, and in an action to recover which the plea of such adjudication is bad on demurrer.

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SAME.—*Practice.—Construction of Statute.*—Under section 778 of the code, proceedings against an attorney who refuses to deliver money, etc., are to be had upon notice and motion to obtain an alternative order for the delivery of the money, etc., or upon failure, to show cause why he should not be punished for contempt; but said section does not contemplate such proceedings in an action of debt.

SAME.—By section 779 of the code, the court may suspend an attorney from practice, but cannot, either under that or section 778, suspend an attorney unless the motion or the prayer of the complaint is therefor, and there has been notice to the defendant.

SAME.—*Defence.*—The refusal of an attorney to pay over money on demand is not, *per se*, a breach of trust or confidence, or cause of removal or suspension from practice, and he should be permitted to show any valid excuse or defence he may have in mitigation or justification.

SAME.—*Appeal.—Effect of.—Judgment.*—From the judgment of an inferior court suspending an attorney from practice, an appeal lies to the Supreme Court, which, when taken, stays all proceedings on the judgment; and the court below has no power or authority to provide in the judgment that the appeal therefrom shall not stay said judgment of suspension.

APPEAL from the Washington Common Pleas.

BUSKIRK, C. J.—This was an action brought by the appellees to compel the appellant to pay and deliver over certain moneys by him collected as an attorney at law. The complaint was as follows:

"Eben C. Jayne and John K. Walker, partners in co-partnership, doing business under the firm name and style of Dr. D. Jayne & Son, complain of Horace Heffren, the defendant in the above entitled cause, and say that the said Horace Heffren is an attorney at law, and that he is now, and for many years past has been, practising his profession as such attorney in the courts of said county; that on or about the — day of May, 1867, the said plaintiffs delivered to the said Heffren for collection a certain promissory note for fifty dollars on one Squire Standiford, and payable to said plaintiffs in their firm name and style of Dr. D. Jayne & Son, as aforesaid; that afterward, to wit, on the 15th day of December, 1869, the said Horace Heffren, as such attorney, did collect and receive from William Standiford, the administrator of the said Squire Standiford, the sum of forty-seven dollars on said note; that the said Heffren has failed

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and refused, and still fails and refuses, although often requested, to deliver over to the said plaintiffs the said sum of forty-seven dollars so collected as aforesaid; and the said plaintiffs pray said court for a rule against the said defendant to pay said money over to them, and for all other proper relief."

The appellant filed an answer in two paragraphs, which were in substance the same. The substance of each paragraph was, that the appellant had been adjudged a bankrupt since he had received the money mentioned in the complaint. The court sustained a demurrer to each paragraph of the answer, and the appellant excepted, and the ruling of the court is assigned for error.

We think the court committed no error in sustaining a demurrer to the answer.

Sec. 33 of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, provides, "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act," etc.

An attorney acts in a fiduciary capacity. The relation between an attorney and his client is one of great confidence, and the law imposes on an attorney the highest degree of good faith. *M' Cormick v. Malin*, 5 Blackf. 509.

We are of the opinion that the case under consideration comes within the last clause of the above quoted section of the bankrupt law.

The appellant then filed another answer in two paragraphs; first, the general denial; second, a set-off. The appellee replied in denial of the plea of set-off. The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the plaintiffs. The court overruled motions for a new trial and in arrest of judgment, and rendered the following judgment:

"It is therefore considered by the court that the plaintiffs, Eben C. Jayne and John K. Walker, recover of the defend-

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ant, Horace Heffren, the sum of forty dollars, so found due as aforesaid, with their costs of suit; and that they have an execution therefor without stay, valuation, or appraisement laws, and returnable in thirty days; and that said Horace Heffren be suspended from practising as an attorney at law in any of the courts of this State for the period of two years; and defendant prays an appeal from said judgment, which appeal is granted, but not to stay said judgment of suspension until determined in the Supreme Court."

The refusal of the court to grant a new trial or to arrest the judgment is assigned for error, and this constitutes the remaining question in the case.

The evidence is not in the record, and we cannot therefore determine whether the finding of the court as to the amount due from the appellant to the appellees is correct or not. We shall presume it was correct. The motion in arrest of judgment presents for review here whether the complaint was sufficient to justify and support the finding and judgment of the court, and the solution of this question depends upon the nature of this proceeding.

It is provided by section 778 of the code, that "when an attorney, on request, refuses to deliver over money or papers to a person from whom, or for whom, he has received them, in the course of his professional employment, whether in an action or not, he may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by the order of any court of record, to do so, within a specified time, or show cause why he should not be punished for contempt."

The above section does not contemplate an action in which a judgment is rendered for the sum that may be found to be due. It is a proceeding upon notice and motion. The purpose of the proceeding is to obtain an order requiring the attorney to deliver over the money or papers within a specified time; and upon failure to comply with such order, he is required to show cause why he should not be punished

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for contempt. The order should be in the alternative; for the attorney cannot be punished for contempt until he has failed to comply with the order, and in that case he has the right to show cause why he should not be punished for contempt.

It is, however, provided by the next succeeding section, that "in cases contemplated in the last preceding section, on such motion, or in an action brought by the party aggrieved, the court may suspend the attorney from practice in any of the courts of this State, for any length of time, in its discretion; judgment may also be rendered for the amount of money withheld, deducting fees, if any are due, and costs paid by the attorney, with ten per cent. damages, which may be enforced by execution, without the benefit of stay or appraisement laws, and returnable within thirty days. The court may also render any judgment, and make any order respecting papers or property withheld, that may be necessary to enforce the right of the party aggrieved, subject to any liens the attorney may have thereon for fees."

By the section last above quoted, the party aggrieved may proceed either by notice and motion, or by a regular action, and in either case the court may render a judgment for the amount of money withheld, deducting fees and costs, which may be enforced by execution. The court may suspend the attorney from practice in any of the courts of this State, for any length of time, in its discretion.

This proceeding seems to have been based upon section 778; as there is no prayer for a judgment, but for a rule, against the defendant to pay the money over to the plaintiffs, and for other proper relief.

The court, however, seems to have proceeded under section 779; for a regular judgment was rendered, to be enforced by execution within thirty days. The force and effect of section 778 is extended and enlarged by section 779; for by that a judgment may be rendered where the proceeding is by notice and motion. We are of the opinion that the court, under the allegations of the complaint, had

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the right to render the judgment it did render in reference to the payment of the money found to be due, but we are equally well satisfied that the court possessed no power or jurisdiction to suspend the appellant from practice as an attorney at law. An attorney is an officer of the court, and his right to practise his profession is secured to him by the constitution and laws of the State, and he cannot be deprived of his rights without notice and an opportunity to be heard in his defence, or to offer anything in extenuation of his conduct, or in mitigation of the severity of the penalty inflicted by law. The appellant was notified that a rule would be asked against him to deliver over the money which should be found due from him to the appellees, but there was nothing in the complaint, summons, or the subsequent pleading which in any manner informed him, or even created a suspicion, that an order suspending him from practice as an attorney would be asked or made. We concede that under section 779 there may be coupled with the proceeding to recover the money a prayer for the suspension of the attorney; but there must be the necessary allegations in the motion or complaint, and the suspension must be asked for. This was decided by this court in *Bougher v. Scobey*, 16 Ind. 151. The court say: "The action is brought to recover of attorneys certain notes, or their proceeds, alleged to have been placed in the hands of the defendants for collection. The complaint prays judgment for the amount alleged to be due, with damages; and asks for execution returnable in thirty days, without benefit of stay or appraisal laws, as provided for in section 779 of the code. Section 780 provides for proceedings to remove or suspend an attorney, and section 781 provides, that 'in proceedings to remove or suspend an attorney, a judgment of acquittal shall be final, and without appeal.'

"This suit we regard as having for its object the collection of the amount claimed by the plaintiffs to be due them, with the statutory penalty of ten per cent, to be collected, by execution, in the manner prescribed; and not the removal,

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or suspension of the defendants as attorneys. Such suspension, or removal, is not asked for in the complaint; nor is the proceeding such as is contemplated by section 780. There is not, neither could there be, in this case, 'a judgment of acquittal,' from which no appeal lies, as contemplated by section 781."

The decision in the above case settles the proposition that the removal or suspension must be asked for in the complaint; and such decision is supported by reason and on principle. The refusal of an attorney to pay over money on demand is not, *per se*, a breach of trust or confidence, or cause of removal or suspension. There are rights and equities between client and attorney that may have to be settled by the courts. An attorney may have a valid excuse or defence for not paying over money by him collected. It was said by this court, in *Dawson v. Compton*, 7 Blackf. 421, which was an action against an attorney for failure to pay over money by him collected, that "in this *quasi* prosecution, the defendants should be permitted to show the circumstances under which the money was withheld, in mitigation, if not in justification, of their conduct."

We are not attempting to offer any excuse, or make any defence, for an attorney who has wrongfully and fraudulently betrayed the sacred trust reposed in his professional honor and integrity; but the commonest principles of justice require that no man shall be adjudged guilty until he has been accused and had an opportunity to be heard in his defence. The rights of attorneys are effectually secured by section 780 of the code, which provides, that "the proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of an individual. In the former case, the court must direct some attorney to draw up and prosecute the accusation; in the latter case, it may be drawn up by any person, and sworn to by the person making it. Such accusation may be filed in any court in which the attorney practises, and after five days' notice of the filing, the attorney shall be bound to appear and plead

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to the same, or suffer judgment by default. If he appear, pleadings may be filed and trial had as in other cases."

By the above section, an accusation has to be made, and notice has to be served, and when these things have been done, and not before, the attorney has to appear and plead, or suffer judgment by default. If we were to hold that in a proceeding to recover money, or to have papers or property delivered up, the court might suspend an attorney, where such suspension is not asked for in the motion or complaint, and where the attorney has had no opportunity to make a defence, or offer anything in extenuation of his conduct, it might result in the greatest abuse and injustice.

The appellant had the right to appeal to this court, and by executing bond he had the right to have the judgment stayed, and the court below had no power or authority in granting the appeal to provide that such appeal should "not stay said judgment of suspension until determined in the Supreme Court."

The above order was in direct conflict with the plain and undoubted requirements of the statute. Section 781 of the code provides that in proceedings to remove or suspend an attorney, the accused, in case of removal or suspension, "may appeal to the Supreme Court, in the same manner as from a judgment in a civil action." 2 G. & H. 330.

It is provided by section 555 of the code, 2 G. & H. 271, that "when an appeal is taken during the term at which the judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, payable to the appellee, with condition that he will duly prosecute his appeal," etc.

It is also provided by section 563 of the code, 2 G. & H. 274, that when a supersedeas is granted and a bond is filed, execution and all other proceedings on the judgment below shall be stayed.

The order of the court was null and void, by reason of being repugnant to the statute. Where a right of appeal is given by statute upon terms and conditions prescribed, the

Heffren v. Lorey.

courts cannot take away or impair such right, or impose new conditions to the exercise thereof.

The judgment of the court below is affirmed as to the payment of the money, but is reversed, at the cost of the appellees, as to the suspension of the appellant from practising as an attorney at law; and the cause is remanded, with directions to the court below to set aside the order of suspension, and to restore the appellant to his rights and privileges as an attorney of said court.

H. Heffren, T. L. Collins, and A. B. Collins, for appellant.
D. M. Alspaugh, for appellees.

HEFFREN v. LOREY.

APPEAL from the Washington Common Pleas.

BUISKIRK, C. J.—This case is, in all of its legal aspects, the same as the case of *Heffren v. Fayne*, ante, p. 463, and is decided the same as that case.

The judgment is affirmed as to the judgment for the money, but is reversed as to the order suspending the appellant from practising as an attorney at law; and the cause is remanded, with instructions to the court below to set aside the order and judgment of suspension, and to restore the appellant to his rights and privileges as an attorney at law in said court.

H. Heffren, T. L. Collins, and A. B. Collins, for appellant.
J. F. Crowe and S. B. Voyles, for appellee.

Fulkerson *v.* Armstrong *et al.*

39 479
124 503
39 472
147 515

FULKERSON *v.* ARMSTRONG ET AL.

BILL OF EXCEPTIONS.—*Affidavit.—Record.*—Affidavits for continuance can only become of record by bill of exceptions; and when they are only copied into the transcript as are the other proceedings, they will not be deemed part of the record by the Supreme Court.

SAME.—*Time.*—Where by the record it appears that a certain time was given by the court below, within which to file a bill of exceptions, it is not sufficient that the clerk certify that the filing of the bill was within the time given by the court, but he must certify the date of filing, so that the Supreme Court may determine whether it was within the time given.

APPEAL from the Tipton Common Pleas.

PETTIT, J.—This suit was brought by the appellees on a promissory note for four hundred and seventy-nine dollars and forty-six cents, with a credit endorsed on it of one hundred dollars. The answer was in two paragraphs; first, failure of consideration; second, fraud in procuring the execution of the note. Reply of general denial to both paragraphs.

There was a trial by the court, and finding and judgment for plaintiffs for the amount due on the note.

The only question presented here is the action of the court in overruling a motion for a continuance, as is said, on certain affidavits. These affidavits are not made a part of the record by bill of exceptions, but are only copied into the transcript by the clerk, as all the other proceedings are. The affidavits are no part of the record, unless made so by bill of exceptions, which is not done in this case, and therefore we cannot notice them to determine whether the court erred or not.

At the close of the transcript it is said:

“And sixty days was given in which to file bills of exceptions and to give bond, with Francis Wheatly as surety, and the defendant now tenders this his bill of exceptions, which is within the time allowed by the court.

“Given under my hand and seal, this 23d day of March, 1870.

WILLIAM GARVER,

“Judge of 14th Dist. C. P. C. of T. Co., Ind.”

Trisler *et al.* v. The State.

Nothing that precedes this purports to be a bill of exceptions, and this cannot be tortured into one setting out the affidavits; but if it could, while the judge has certified when he signed, the clerk has not informed us when it was filed in his office. This court has repeatedly held, that when time is given to file a bill of exceptions, the clerk must certify or show in the record the date of the filing, that we may know that it was done in time. We cannot say, therefore, that the court erred in refusing a continuance.

The judgment is affirmed, at the costs of the appellant.

F. Green and D. Waugh, for appellant.

N. R. Overman, for appellees.

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39 473
151 317

CRIMINAL LAW.—*Separate Trial.*—By statute (2 G. & H. 416, sec. 105), where two or more defendants are indicted jointly, any defendant requiring it must be tried separately.

SAME.—*New Trial.—Bill of Exceptions.—Supreme Court.—Assignment of Errors.*—The refusal of the court below to grant a separate trial, when required, to a defendant indicted jointly with others, is not one of the statutory causes for a new trial; and, hence, the exception to such error may be saved by a bill of exceptions, and the refusal assigned for error in the Supreme Court.

APPEAL from the Decatur Circuit Court.

DOWNEY, J.—Three persons were jointly indicted for violating the Sabbath. On being arraigned, they pleaded not guilty, and demanded to be tried separately, which the court refused. The cause was tried by the court without a jury, and the defendants were found guilty and fines assessed against them, for which judgment was rendered. There was no motion for a new trial. The appellants assign as error, first, the refusal to grant separate trials; and, second, in finding them guilty and assessing fines against them.

Koerner et al. v. Baldwin.

If the refusal to grant separate trials was an error of law occurring at the trial, there should have been a motion for a new trial, in order properly to present the question here. *Lures v. Botte*, 26 Ind. 343. New trials in criminal cases may be granted for the causes mentioned in section 142, 2 G. & H. 423. The refusal to grant separate trials is not among the causes here enumerated, and hence we think the question may be saved by bill of exceptions, as was done in this case, without a motion for a new trial. It is expressly provided by statute, that "when two or more defendants are indicted jointly, any defendant requiring it, must be tried separately." 2 G. & H. 416, sec. 105. This provision seems to us to be decisive of the question.

The judgment is reversed, and the cause remanded.

C. Ewing and F. K. Ewing, for appellants.

B. W. Hanna, Attorney General, for the State.

KOERNER ET AL. v. BALDWIN.

APPEAL.—Supreme Court.—Notice.—Where part of several co-parties appeal to the Supreme Court; but do not serve notice of appeal upon all the other co-parties, and file proof thereof with the clerk of the Supreme Court, the appeal will be dismissed by said court.

APPEAL from the Marion Superior Court.

DOWNEY, J.—This appeal is taken and the errors assigned by only a part of the judgment defendants, without a compliance with section 551, 2 G. & H. 270, and for that reason must be dismissed. *Kirby v. Holmes*, 6 Ind. 33.

Appeal dismissed, with costs.

W. W. Leathers, R. H. Hall, and *A. Seidensticker*, for appellants.

C. H. Test, D. V. Burns, and *G. S. Wright*, for appellee.

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THE MUTUAL BENEFIT LIFE INSURANCE COMPANY *v.* MILLER, ADMINISTRATRIX.

39	476
133	381

PRACTICE.—*New Trial.—Assignment of Errors.—Supreme Court.*—Errors occurring during the trial of an action in the court below must be set forth in a motion as reasons for a new trial, and, except the overruling of that motion, cannot be assigned for error in the Supreme Court.

SAME.—*Judgment.*—If a motion for a new trial is correctly overruled, judgment follows as of course, and the assignment of error that the court below erred in rendering the judgment has no foundation.

SAME.—*Instructions.*—Where counsel for a party, openly, in court, in the presence of the adverse party, asked the court that the instructions to the jury be in writing, and afterward, when it was too late for the adverse party to make such request, withdrew his request, the adverse party could not complain of such withdrawal; for, if he desired the instructions to be in writing, he should have preferred his own request.

CONTRACT.—*Life Insurance.—Policy.*—Where a policy of life insurance, on its face, refers to the declaration, and the declaration refers to the particulars of the insured, given by him in answer to questions, these, as one instrument, constitute the agreement of the parties to the policy.

SAME.—*Warranty.*—A covenant or agreement, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to and made a part of the policy.

SAME.—*Questions propounded to, and answered by, the insured in his application for a policy are designed to induce a full and fair statement of the physical condition of the applicant, and the answers are warranties that the facts are as stated.*

SAME.—“*Spitting of Blood.*”—Where the applicant, to a question in the application whether since childhood he had had “spitting of blood,” answered, “No,” which was untrue;

Held, that the answer was material, and also a warranty that he had not had “spitting of blood,” from any cause.

SAME.—*Representations.*—The difference between a warranty and a representation is, that a warranty must be true, while a representation must be true only so far as the representation is material to the risk; and it is material when a knowledge of the truth would have induced the insurers to have refused the risk or charged a higher rate of premium.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This was an action by the appellee, as administratrix of the estate of Herman A. Miller, deceased, against the appellant, on a policy of insurance upon the life of the deceased. It was provided in the policy, that if the declaration made by or for the assured, of even date with

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the policy, and upon the faith of which the agreement was made, should be found in any respect untrue, then in such case the policy should be null and void. It was stipulated in the declaration, made and signed by the deceased at the time of his application for insurance, that the answers of himself, his physician, and his friend, should be the basis of the contract. In the particulars given of himself, the following questions and answers occurred:

"10. Has the party had, since childhood, disease of the heart, rupture, fits, dropsy, liver complaint, biliary colic, rheumatism, gout, habitual cough, bronchitis, asthma, spitting of blood, consumption, paralysis, apoplexy, insanity, fistula, ulcers, or disease of the kidneys or bladder, and which? No.

"11. Has the party had any sickness within the last ten years? if so, what? Yes, scarlet fever, eight years ago.

"12. Has the party now any disease or disorder? if so, what? No."

The first paragraph of the answer alleges, that the answer to the tenth question was false, in this, that before the time at which said answer was made, the said Herman A. Miller had had spitting of blood, and had had, and then had, consumption; and that the answer to question eleven was false, in this, that prior to the time at which said answer was made, said Miller had had sickness other than scarlet fever eight years before, to wit, bleeding of the lungs; and that the answer of said Miller to the question numbered twelve was false and untrue, in this, that at the time when said answer was made, the said Miller had consumption of the lungs.

The second paragraph of the answer alleges, that the execution and delivery of the said policy of insurance was obtained by the fraud and misrepresentation of said Miller, in this, that he pretended and represented to the defendant, at the time when he applied to the defendant to make and deliver to him the said policy of insurance, that he never had, since childhood, had spitting of blood, whereas, in truth

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and in fact, he had had spitting of blood within one year prior to said application; and that he had had no sickness within the past ten years other than scarlet fever, whereas, in truth and in fact, he had had, within the past one year, bronchitis and bleeding of the lungs; and that he then had no disease, whereas, in truth, he then had the disease known as consumption; and that he had not had any medical attendant for the past seven years, when he had been attended by at least two physicians within the past seven years. All of which representations the said Miller well knew to be false.

Issue was formed by a general denial of the paragraphs of the answer. There was a trial by a jury, and general verdict for the plaintiff, and also certain special findings.

The defendant moved the court for a new trial, because,

1. The verdict was contrary to law.
2. It was contrary to the evidence.
3. It was not sustained by sufficient evidence.
4. Because error of law occurred at the trial of the cause, which was excepted to at the time by the defendant, in this, that the court, in giving instructions to the jury, gave instructions contrary to law.
5. Because of error of law occurring at the trial of the said cause, which was excepted to at the time by defendant, in this, that the court refused to give to the jury instructions asked for by the defendant, which said instructions were according to law.
6. Because the defendant and her counsel were surprised at the withdrawal, by the counsel for the plaintiff, of his demand for written instructions, after he had notified the court and defendant's counsel that he made such a demand; such withdrawal having been made without notice to the defendant or her counsel, and a knowledge of which did not come to defendant or her counsel until too late to make such a demand on their own behalf.
7. Misconduct of the counsel for plaintiff, in withdrawing his demand for written instructions, after public notice

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of such demand, without notifying the defendant or her counsel of such withdrawal.

This motion was overruled by the court, and final judgment rendered on the verdict of the jury for the plaintiff.

The errors assigned are:

1. That the court erred in giving to the jury the instructions set out in the record.

2. The court erred in refusing, at the request of the defendant, to give the instructions asked for by appellant, and which are set out in the record, and numbered 1, 2, 3, 4, 5, 6, 7, and 8.

3. The court erred in overruling the motion of appellant to set aside the verdict of the jury and grant her a new trial herein.

4. The court erred in rendering the judgment against appellant, which is set out in the record.

For the errors occurring during the trial, we must look to the reasons assigned in the motion for a new trial, and not to the assignment of errors, except so far as it alleges the improper overruling of that motion. The first and second assignments of error must, therefore, be disregarded by us. The fourth alleged error has nothing on which to rest. If the motion for a new trial was properly overruled, the judgment followed as of course. We shall then proceed to examine the reasons which were assigned for a new trial.

Nothing is urged under the first reason for a new trial, that is, that the verdict was contrary to law.

The second and third reasons are, that the evidence was not sufficient to justify the finding of the jury.

The policy was made on the 3d day of September, 1869. It became material to know, among other things, whether the deceased, before that time, had had, or then had, spitting of blood or hemorrhage from the lungs, or not, or whether he then had consumption or not, and whether he had any disease. John Rasch testified that the deceased was employed in his store on the 1st day of July, 1869, and remained there for sixteen or seventeen days, when he left on account

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of bad health; that during that time he had bleeding of the lungs several times very badly; that he often spit up more than a tumbler full of blood; that at one time while he was there they thought he was going to die, and he went after Dr. Ehrman and brought him to the store to see Miller; that Miller told him, after he left his employment, that he was going to get his life insured, in order to get the money on the policy; that he had been to see Dr. Sheller, and that the doctor had told him that the bleeding came from his lungs.

Dr. H. M. Harvey testified that the deceased came to his office in the early part of July, 1869, to consult him; that the deceased told him that he had had hemorrhage; that he examined him and found that he had tubercles upon one of his lungs, he did not remember which; he told the deceased that he had incipient consumption, and that he must change his employment and live more in the open air; that the deceased came to see him a second time during the same month, and told him that he had had another hemorrhage; that he told the deceased that hemorrhage was rather a favorable symptom than otherwise, because the bleeding carried away with it the foreign matter that was in his lungs; thinks he told him that there was nothing serious the matter with him, though he told him at the time that he had incipient consumption; he knew this to be so from a careful examination of his lungs, and from what the deceased told him of his hemorrhages.

John Meyer testified that when the deceased came to Rasch's store he was not sick, that he knew of, but after he had been there a little while he commenced spitting blood; saw him spitting blood at the store four or five times; saw him spitting blood shortly after he was insured; the deceased staid at Rasch's store after he was insured; sometimes worked at the books, and sometimes sold shoes.

Dr. Ehrman testified that Rasch came for him to go to see Miller; he went, and found Miller suffering from hemorrhage of the lungs, and saw him spitting blood; it came

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from the lungs and in considerable quantities; does not remember the time; it was at Rasch's store; thinks it was the last spring.

Dr. Sheller testified that he was the attending physician of Miller from August 6th, 1869, to the 18th of November following; the first time he was called to see him was at the house of Christian Georges, on the 6th of August, 1869; he had a hemorrhage of the lungs; saw him spit up the blood, and knew it came from the lungs; he made a close examination of him at that time; he then had consumption, and he attended him for it up to the 18th of November, 1869; when he first saw him he told him he was in a very dangerous condition.

The defendant also gave in evidence the declaration and the particulars of himself, signed by the deceased, containing the questions 10, 11, and 12, and the answers thereto, referred to in the pleadings, and also a statement by the deceased, that he had not had any medical attendance for the last seven years previous thereto. The deceased died April 2d, 1870, of disease of the lungs.

There was other evidence for the defendant, and also evidence for the plaintiff, but it is not necessary to set it out, as it did not materially contradict that which we have stated.

We think, from the evidence, that the jury should have found that, prior to the issuing of the policy, the deceased had had spitting of blood, and that he then had consumption; that he knew he had had spitting of blood, and had sufficient reason to believe that he then had consumption.

The singular charge given by the court, to which an exception was taken, was as follows:

"The jury must treat this case just as if it was between two individuals, the corporation being entitled to precisely the same rights as though it were a natural person. In the consideration of the questions put to Miller by the company, the jury are to interpret the language used by the usual and ordinary meaning attached to the words. These questions and answers are contained in an instrument which I

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hold in my hand. Now, in his declaration the party says he is twenty-two years of age. Will anybody pretend that if he had made a mistake of one day it would make the policy void? They ask him if he had ever resided abroad, and, if so, whether he was affected with any of the diseases peculiar to the climate. No ordinary man would know what diseases were peculiar to any given climate. In question number ten they ask him if he ever had since childhood a long list of complaints with hard names. In the first place how are you going to tell when childhood ended. One of the diseases mentioned is rheumatism. Nobody knows, except a physician or surgeon, what that is, and no two doctors agree about it. They tell me I have rheumatism when I know I have not. There is not one man in a thousand in this country that ever saw a case of gout. As to bronchitis, there is not one of you that knew what that disease is until I made the doctors explain it; perhaps some of you know what asthma is. Consumption is a term that we all understand to mean a disease of the lungs. Here is mentioned a disease called fistula. Most people would take that to mean such a disease as horses have, which almost always affects them about the shoulders, but I suppose they mean here what is called *fistula in ano*. Question eleven is, has the party had any sickness within the past ten years? There is no man that has not been sick sometime in his life. I am sick now. The party can only be required to answer as to sickness that was of such a character as to increase the risk upon his life beyond what it would be upon the life of a man in ordinary good health. If he had had a slight sickness at some time during the last ten years, a negative answer would not be so untrue and fraudulent as to avoid the policy. Question seventeen, in which Miller is asked for the name of his usual medical attendant, must be taken to mean a physician who has attended him in frequent sickness, and cannot be taken to mean one who has attended him only once or twice; and if he had two or three physicians to prescribe for him in oc-

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casional sickness, he cannot be said to have a usual medical attendant.

"The certificate of Miller that he had had no medical attendance within the past seven years, must be construed in the same way. It cannot be held to mean that he had not had such attendance as Harvey or Ehrman, one of whom saw him twice, and the other only once. If Dr. Sheller attended him from the 6th day of August, 1869, constantly to the 3d day of September, 1869, frequently, not every day, but often, it would make the certificate a fraud upon the company. In order to find that Miller was guilty of fraud upon the company in answering that he had no disease or disorder on the 3d day of September, 1869, they must find that he had such a disease or disorder as would materially increase the risk upon his life, and that he knew, or had good reason for believing that this was the case. A man may have incipient tubercular consumption, and not be aware of it, especially if the examining surgeon of the company has examined him, and pronounced him sound. If the jury believe that on the 3d day of September, 1869, Miller had consumption, and knew he had it, or had reason to suspect that he had it, they will have to find for the defendant. Spitting of blood is not necessarily a disease which would materially affect the risk. It may occur from a cold, or a blow upon the face or chest, or from inflammation of the fauces or posterior cavity of the mouth, or inflamed gums, and perhaps sundry other causes, none of which would be deemed material by the insurance company.

"In order to find that Miller was guilty of fraud, the jury must find that he knew or was advised, or had good reason to suspect, that he was in such a physical condition as to render the risk greater than in ordinary cases of men in apparent good health. The examining physician, Dr. Walker, must be deemed an agent of the company, and that he is skilled in his profession, and, in the absence of proof to the contrary, that he discharged his duty to the company, and was likely to detect consumption or slight symptoms of it,

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if it had so far progressed as to make the applicant conscious of the fact that he was diseased."

The charges asked by the defendant, and refused, are as follows:

"First. If the jury believe from the evidence that the defendant, before the execution and delivery of the policy sued on, propounded the several questions contained in the application of Herman A. Miller, a copy of which is set out in the answer, to the said Herman A. Miller, and that there is any untrue or fraudulent allegation contained in the same, made to them by the said Miller, as set up in the answer, they must find for the defendant.

"Second. The declaration and answers by the said Herman A. Miller are to be taken as warranties that the statements and answers to questions are true, and any misstatement or untrue answer which is stated in the answer of defendant will render the policy void, and you must find for the defendant; and this will be so whether you find that the misstatement or untrue answers were made fraudulently or otherwise.

"Third. The contract between the insurance company and the insured is like a contract between two individuals. If one makes false statements with reference to facts material to the settlement of the terms upon which the contract shall be made, which are exclusively within his own knowledge, and thereby induces the other to agree to terms which he might not otherwise have assented to, the party deceived cannot be held liable upon the contract.

"Fourth. If the jury believe, from the testimony, that in July, 1869, Herman A. Miller had spitting of blood, they must find for the defendant.

"Fifth. If the jury believe that Herman A. Miller falsely represented to the defendant, that he had had no medical attendance for the seven years next preceding the 3d day of September, 1869, they must find for the defendant.

"Sixth. It is not necessary for the defendant, in order to entitle her to a verdict in her favor, to show that Herman A.

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Miller knew at the time of making his answers, that they were untrue, if in fact they were untrue.

"Seventh. If the jury find that on the 3d day of September, 1869, Herman A. Miller had consumption, they must find a verdict for the defendant, and it makes no difference whether he knew it or not. He may have been entirely ignorant of the fact, or may have believed that the symptoms he had did not indicate consumption; yet if, in fact, he had consumption at that time, the jury must find for the defendant.

"Eighth. If Herman A. Miller, prior to the 3d day of September, 1869, and since his childhood, had had spitting of blood, no matter from what cause, it was his duty to have stated the fact in answer to question number ten of his application, and if he failed to do so it was a fraud upon the company and renders the policy void, and the jury must find for the defendant, if, in addition to this, they find that the said Miller made the answers to the questions as averred in the defendant's answer."

We think that the policy, the declaration, and the particulars of the applicant, must be regarded as one instrument. The policy on its face refers to the declaration, and it refers to the particulars. A covenant or agreement, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to in, and made a part of, the policy. *Cox v. The Aetna Insurance Company*, 29 Ind. 586, and authorities cited; Angell Fire and Life Insurance, sec. 151; Bliss Life Insurance, sec. 57. If the applicant had had spitting of blood prior to the time when he effected insurance on his life, we think he was bound to state the fact in the particulars of himself given by him in answer to the questions propounded to him, and that the fact that he was examined by a surgeon, employed for that purpose by the company, was no excuse for not having done so. Such questions are designed to induce a full and fair statement of the condition of the party seeking insurance; and in this case the answers must be held to be warranties on the part of the applicant that the facts were as stated by him. Whether the hemor-

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rhage proceeded from one cause or another, it was material and necessary that the statement in answer to the question relating to it should have been true.

Geach v. Ingall, 14 M. & W. 95, was an action upon a policy of life insurance, and was very similar in its facts to the case under consideration. The defendant pleaded several special pleas, among them one in which he alleged that the declaration and statement of the assured was untrue, in this, that at the time of making the same, the said assured had had spitting of blood. Lord DENMAN, before whom the case was tried, instructed the jury that it was for them to say whether, at the time of making the statement, the assured had had such spitting of blood as would have a tendency to shorten life. Upon appeal and hearing before POLLOCK, C. B., and Barons ALDERSON and ROLFE, a new trial was ordered for the misdirection of the judge. POLLOCK, C. B., said: "By the expression 'spitting of blood' is, no doubt, meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body; still, however, one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought, therefore, to be stated." ROLFE, B., said: "I have no doubt that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The fact should be made known to the office, in order that their medical adviser might make inquiry into its cause."

In *Vose v. The Eagle Life, etc., Ins. Co.*, 6 Cush. 42, one of the questions propounded to the insured, when he applied for insurance, was, "Has the party or any of his family been afflicted with pulmonary complaints, consumption, or spitting of blood?" To which he answered in the negative; and it is said: "The usual mode of proceeding, to effect an insurance upon a life, is, for the party wishing to insure to procure at the office of the insurers a printed form of proposal, which is to be filled up by him. This form, in general, contains a large number of interrogatories, the answers to which

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are to be written upon the blanks left for the purpose. This was the course of proceeding in the present case, and several of the interrogatories and answers thereto are given in the statement. This proposal or declaration, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends. The party effecting an insurance cannot be too cautious, therefore, in ascertaining the real state of the facts alleged in his declaration."

In that case, because the party had answered the above interrogatories untruly, judgment was given for the company.

A warranty may be of the existence or non-existence of some fact, when it is in the nature of a precedent condition; or it may be promissory, as when the insured undertakes to perform or abstain from some act in the future, when it is in the nature of a condition subsequent.

A representation differs from a warranty; for while the latter must be true, the former need only be substantially true—true so far as the representation was material to the risk. A fact is to be deemed material, if a knowledge of it would have induced the insurer to have refused the risk or to have charged a higher rate of premium for taking it.

The charge given by the court in this case need not be particularly examined. The court seems to have lost sight entirely of the distinction between a warranty and a mere representation. Had the case been tried on the issue formed on the second paragraph of the answer alone, the doctrine with reference to the effect of misrepresentations might have been applicable. But the charge given to the jury by the court was wholly inapplicable to the issue formed by the first paragraph of the answer setting up the warranties.

Whether the case is to be regarded as one depending on the warranties, or on the misrepresentations alleged in the

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second paragraph of the answer, we are clear that it was wrongly decided.

The instructions asked by the defendant, and refused by the court, being in accordance with the law as above stated, should have been given by the court, and the charge given should have been withheld; or so far as it was law, and applied to the question of representations, it should have been confined to the issue formed by the denial of the second paragraph of the answer.

The remaining question is new. The law requires the judge, when requested by either party, to put his instructions to the jury in writing. Here the counsel for the plaintiff openly requested the court to put the charge in writing, and afterward, when it was too late, as is contended, for the defendant to make such a request, the demand of the plaintiff for written instructions was withdrawn. It is insisted that this is cause for reversal of the judgment. We do not think so. It does not appear that any oral instructions were given by the court, or that the defendant was in any way injured by the course pursued. The court might, without doubt, have taken the necessary time, if the request had been made, to prepare instructions in writing, but no such request was made.

The defendant had the same right to ask for, and insist upon, written instructions, that the plaintiff had, and if it wished to make sure of such charges, should have preferred its own request, and not depended on its adversary.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

B. Hynes, for appellant.

C. Denby and D. B. Kumler, for appellee.

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39	488
124	556
39	488
128	17
39	488
131	562

KISLER v. CAMERON ET AL.

MANDAMUS.—Election.—Inspectors of Election.—The inspectors of a city election, in the canvass of votes to ascertain the persons chosen at a city election, are officers, and together constitute a board; their duties as such are ministerial, and not judicial, and a mandamus will lie to compel them to give a certificate of election to the person who, upon the face of the proper election documents, appears to have received the highest number of votes given.

APPEAL from the Carroll Circuit Court.

BUISKIRK, C. J.—The record in this cause presents for our decision but a single question, and that arises upon the action of the court below in sustaining a demurrer to the complaint.

The material averments in the complaint are these: That the city of Delphi was duly and legally incorporated as a city under and by virtue of the act for the incorporation of cities; that there were wards in said city; that an election was had in said city on the second day of May, 1871, for the election of a mayor and other officers; that the mayor and common council of said city, in due form of law, appointed the appellees inspectors of said election, in their respective wards, and certain other persons named judges and clerks of such election, all of whom qualified and entered upon the discharge of their duties; that Robert M. Allen, the Rev. —— Campbell, and the appellant were the only candidates for the said office of mayor of said city at said election; that it appears from the poll books, tally papers, and certificates of the inspectors, judges, and clerks of the several wards of said city, that the appellant received a majority of all the legal votes that were cast at said election, and that he was duly and legally elected to the office of mayor of said city; that the poll books, tally papers, and statements made out by the officers of the said election in the several wards were delivered to the inspectors of said election, duly certified copies whereof were filed with and made a part of the complaint; that it was the further duty of said inspectors on the day following said election to meet as a

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board of canvassers at the council room of said city, and upon inspection of the statements aforesaid, determine the persons having the highest number of votes for each of the several offices voted for, and thereupon to make and sign a certificate, setting forth the names of the persons voted for, what offices, the whole number of votes given for each of the several offices, and the person having the highest number therefor, and to declare the person elected to the same; such certificate to be filed with the clerk of the corporation; also averring that at said election the appellant received a majority of all the votes cast in said city for said office of mayor, and that the said inspectors, when so met as a board of canvassers, failed and refused to make and sign a certificate as by law required, and file the same with the clerk of said city.

The prayer of the complaint was that the court would issue a writ of mandate, compelling said defendants to comply with their duties in the premises, and issue a certificate of election to the appellant.

The appellees appeared to the action and filed a demurrer to the complaint. The demurrer was sustained, and proper exceptions were taken. The appellant refused to plead further, and final judgment was rendered for the appellees. The appellant has assigned for error the sustaining of the demurrer to the complaint.

Section 4 of the act for the incorporation of cities provides for the appointment of inspectors, judges, and clerks of the first election in a city. It is provided by section 10 of said act, that all elections of such cities shall be governed by the laws in force regulating township and other elections, and the voters therein shall have the like qualifications and be subject to the same restrictions and liabilities.

It is provided by section 15 of said act, that "the common council shall, for every subsequent election, appoint by resolution an inspector and two judges therefor, in each of the several wards of the city; but the persons thus appointed

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shall be residents and voters of such ward, and when convened as a board of election, shall choose the clerk thereof."

It is provided by section 11 of said act, that when the polls of any election are closed, the inspector and judges thereof in each of said wards shall immediately proceed to canvass the votes therein given, and shall make out, under their hands, a statement specifying the number of votes each person voted for has received and the office designated thereby, which statement, together with the poll list and tally papers, shall be deposited with the inspector.

By section 12 of said act it is made the duty of the several inspectors of such election, on the day next following the same, to meet at the common council room, and upon the inspection of the statements aforesaid, determine the persons having the highest number of votes for each of the several offices voted for, and thereupon to make and sign a certificate setting forth the names of the persons voted for, and for what offices, the whole number of votes given for each of the several offices, and the person having the highest number therefor, and to declare the person elected to the same. 3 Ind. Stat. 64.

The purpose of this proceeding is to compel the inspectors of said election to perform the duty imposed upon them by the 12th section of the above recited act; and the real question in the case is, whether a mandate is the proper remedy.

It is provided by section 739 of the code, that "writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins; or a duty resulting from an office, trust or station." 2 G. & H. 322.

There seems to be no room to doubt that the case made by the complaint clearly comes within both the letter and the spirit of the above section. The law especially enjoined upon the inspectors the performance of a plain duty. The inspectors are officers, and constitute a board. The duty imposed is ministerial. "It is not within their province to

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consider or determine any questions relative to the validity of the election held or of the votes received by the persons voted for. They are simply to cast up the votes given for each person, from the proper election documents, and to declare the person who, upon the face of those documents, appears to have received the highest number of the votes given, duly elected to the office voted for." *Brower v. O'Brien*, 2 Ind. 423.

The writ of mandamus, even when it is used to place a person in possession of an office, confers no right. It merely places him in possession of the office to enable him to assert his right, which in some cases he could not otherwise do. *Brower v. O'Brien, supra*, and authorities there cited.

Moses on Mandamus, page 90, says: "So where the duty of a board of canvassers of an election is simply to receive and count the returns of votes, and not to judge of their validity, or of any fraud affecting them, that question being for another specially appointed tribunal, upon a case properly brought after the board have declared the result, the action of the board in this matter is ministerial only, and mandamus will therefore lie to compel them to perform their duty."

The doctrine as stated by Moses is in full accord with the weight of authority. See the authorities collected and cited in notes on pages 320 and 321, 2 G. & H.; *The State of Iowa, ex rel. Rice, v. The County Judge of Marshall Co.*, 7 Iowa, 186; *The State of Iowa, ex rel. Byers, v. Bailey*, 7 Iowa, 390; *Luce v. Mayhew*, 13 Gray, 83; *Strong, Petitioner, etc.*, 20 Pick. 484.

We are of opinion that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

B. B. Dailey, for appellant.

C. N. Pollard, for appellees.

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| 39 492
| 165 312

LEACH ET AL. V. PREBSTER ET AL.

PRACTICE.—*New Trial.—Assignment of Errors.*—The reasons embraced within the statutory cases in which a new trial may be granted must be assigned as reasons for a new trial in the court below, and are not properly assignable as error in the Supreme Court.

SAME.—The assignment as error of the action of the court below upon a motion for a new trial renders it unnecessary to assign as error any of the reasons properly embraced in the motion for a new trial.

SAME.—Errors of law occurring prior to the commencement of the trial need not be assigned as reasons for a new trial, but must be assigned as error in the Supreme Court.

SAME.—Errors of law occurring during the progress of the trial must be assigned as reasons for a new trial in the court below, to entitle them to review in the Supreme Court.

WILL.—*Evidence.—Experts.—Witnesses,* other than medical experts, are competent to give an opinion, from the facts testified of by them, as to the sanity or insanity of a testator at the time of the execution of his will.

SAME.—*Widow.—Election.*—In the absence of an avowed election by the widow, with full knowledge of the provisions of the will, no time for such election being fixed by the statute, the widow will be entitled to take under the statute.

SAME.—Where a will is adjudged void for want of mental capacity in the testator, it is void as to the widow who may have elected to take under the will.

APPEAL from the Hendricks Common Pleas.

BUSKIRK, C. J.—This was a proceeding on the part of the appellees against the appellants to revoke the probate and contest the validity of the will of Frederick Prebster, deceased, on the ground that the testator was at the time of the execution thereof of unsound mind.

Leach, the executor, answered in three paragraphs; first, the general denial; second, that the testator was of sound mind at the time of the execution of the will; third, that Mrs. Prebster, the widow of the deceased, was estopped from contesting the validity of said will, because she had, subsequent to the probate thereof, received from him as such executor certain personal property and money belonging to such estate, under and by virtue of said will, and had received him therefor.

The other defendants answered by the general denial. The

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plaintiffs replied by a denial of the second and third paragraphs of the answer of Leach.

The cause was, by the agreement of the parties, submitted to the court for trial. The court found from the evidence that the deceased was insane and incapable of making a will at the time of the execution of the will in controversy.

The appellants moved the court for a new trial, and assigned three written reasons therefor, as follows: first, because the decision of the court was contrary to the evidence given in said cause; second, that the decision of the court in favor of the plaintiffs in said cause, setting aside and annulling the will of Frederick Prebster, was contrary to law and the evidence given on the trial of said cause; third, that the court erred in suffering certain witnesses in said cause to give their opinion as to the soundness of mind of Frederick Prebster, deceased, over the objection of the defendants.

The court overruled the motion for a new trial, to which ruling the appellants interposed an exception. The court then rendered judgment on the finding, revoking the probate of said will and setting the same aside as void.

The appellants have assigned the following errors:

"First. That the finding and judgment of said court in favor of appellees against appellants, setting aside and declaring that the writing in said complaint mentioned was not the last will and testament of Frederick Prebster, deceased, was and is contrary to law.

"Second. That the finding and judgment of the court below in favor of appellees, that the writing in said complaint mentioned was not the last will and testament of Frederick Prebster, deceased, and that Frederick Prebster was not of sound mind at the date of the execution of said writing, and against appellants, was and is contrary to the evidence given on the trial of said cause, and the finding is not sustained by the evidence on said trial. The judgment ought to have been given in favor of the appellants, and against the appellees, in said cause, sustaining the writing in said complaint mentioned as the last will and testament of the said Fred-

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erick Prebster, deceased, and against the appellees, with all costs.

"Third. That the court below erred in suffering Eliza A. Prebster, the widow of Frederick Prebster, deceased, and one of the plaintiffs in said cause, to testify as a witness, in her own behalf, on the trial of said cause, over the objections of the appellants.

"Fourth. That the court below erred in suffering witnesses introduced by appellees on the trial of said cause, not experts, to give it as their opinion that Frederick Prebster was not of a sound mind both before and after the execution of his will, over the objection of the appellants.

"Fifth. That the court below erred in suffering, over the objection of the appellants, persons not experts, witnesses in said cause, on the trial thereof, to give it as their opinion that Frederick Prebster, at the time of the making of the writing in said complaint set forth, was not of a sound mind, they not being subscribing witnesses thereto.

"Sixth. That the court below erred in finding in favor of Eliza A. Prebster, upon the issues joined between her and the said Elias Leach, executor of Frederick Prebster, deceased, against the appellants, or either of them.

"Seventh. That the court below erred in refusing to give to the appellants a new trial in said cause. For which and other errors they pray that said judgment may be reversed at the costs of appellees."

Of the above formidable array of assignments of error, there is but one that is valid and presents any question for our decision, and that is the seventh. The first, second, fourth, and fifth assignments would have constituted valid reasons for a new trial if the argumentative portion was stricken out. The third presents no question for our decision, because the admission of Mrs. Prebster as a witness was not assigned as a reason for a new trial in the court below, and cannot, for that reason, be assigned for error here. The sixth assignment was unnecessary, as it is embraced by the seventh.

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Errors of law which occurred prior to the commencement of the trial, such as rulings on demurrers, motions to strike out parts or the whole of a pleading, and the like, need not be assigned as reasons for a new trial, but must be assigned for error in this court. All errors of law which occurred during the progress of the trial, and which were excepted to at the time, must, to entitle them to review in this court, be assigned as reasons for a new trial, and when such motion is overruled and excepted to, an assignment of error, that the court erred in overruling the motion for a new trial, presents for review in this court every question which was embraced in the motion for a new trial. The motion for a new trial cannot be enlarged in this court by assigning for error matters not embraced in the motion for a new trial. The reason of the rule is, that the attention of the court that made the ruling should be called to such ruling, and an opportunity be given to correct the error. If the alleged erroneous ruling is assigned as a reason for a new trial, and the court adheres to such ruling, then the party complaining of such ruling has done all in his power to obtain relief in the court below, and having failed, he has the right to come into this court and demand the relief which the law entitles him to. The rule is founded in wisdom. A court engaged in the trial of a cause is frequently compelled to make rulings without time for reflection, or opportunity to consult the authorities. When the trial is over, and such ruling is assigned for a new trial, the court has time for reflection, to hear the arguments of counsel, and to examine the authorities upon the point. When this course is pursued, the court, by granting a new trial, can cure the error and save the parties the expense, inconvenience, and delay occasioned by an appeal to this court. If the courts below would give careful and mature consideration to motions for new trials, and grant them whenever the justice of the case demands that it should be done, the parties litigant would be saved much expense and delay, and the pressure upon this court would be greatly relieved.

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Did the court err in overruling the motion for a new trial? It is insisted, in the first place, that the court erred in permitting witnesses, who were not medical experts, to give their opinion, from the facts testified to by them, as to the sanity or insanity of the testator at the time of the execution of the will. That such evidence was competent and proper, has been too often decided by this and other courts to justify a reference to authorities.

In the next place, it is earnestly maintained by the learned counsel for the appellants, that Mrs. Prebster, the widow of the deceased, is estopped from contesting the validity of the will of her deceased husband.

The decedent departed this life childless, leaving his widow and mother as his sole heirs at law. By his will he devised and bequeathed to his wife his entire estate, real and personal, for and during her life. The third clause of the will reads as follows:

"3d. My will is, that at the death of my said wife, all of said property not used for her maintenance, both real and personal, go to and be the property of Mary Ellen Jones, a girl that I am now raising, on this condition, provided the said Mary Ellen Jones stay with my said wife and be subject to her control, until she becomes of lawful age, and if she should not be industrious and careful of property, or goods, or should marry a man likely to squander and waste said property, or should die before my said wife, then my will is, that it shall pass and descend in fee simple to the Christian Church, under the control and to be used by the trustees of said church, for the benefit thereof."

The appellant Leach was appointed executor of said will, who qualified and entered on the discharge of his duties. He caused an inventory of the personal estate to be made, which amounted in the aggregate to the sum of two thousand two hundred and forty-nine dollars.

The widow selected at their appraised value articles which amounted to the sum of seven hundred and forty dollars and twenty-five cents.

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The executor required her and the mother of the deceased to give a receipt, which is in the words following:

"April 28th, 1870. Received of Elias Leach, executor of the estate of Frederick Prebster, deceased, all of the property set off and marked to me, Eliza A. Prebster, widow of said deceased, for my use and maintenance, as set out in the will of the said deceased; and we, Eliza A. Prebster and Christiana Prebster, are hereby bound for the faithful and proper application and preservation of said property, and the return thereof, at the proper time, of all that may not be necessarily used in the support of said widow.

"ELIZA A. PREBSTER,
"CHRISTIANA PREBSTER."

It is claimed by the counsel for the appellant that the giving of the above receipt amounted to an election to take under the will, and that, after having given such receipt, the widow could not take under the law and contest the validity of the will.

There is no time fixed by our statute within which a widow is required to elect whether she will take under the statute or the will. In the absence of an election to take under the will, the widow will be entitled to take under the statute. To entitle a widow to the provisions made for her in a will, there must be an election on her part to take under the will. It was decided by this court, in *Piercy v. Piercy*, 19 Ind. 467, that there must be an avowed election on the part of the widow of her intention to take under the will, before she could be barred of her rights under the statute. The amount received by the widow was less than she would have been entitled to under the statute. There was evidence tending to show that at the time of the execution of the above receipt, the widow was not fully informed as to the provisions of the said will, or of her rights under the will. The law is stated thus by Redfield on Wills: "It is proper to remember that in order to bind any person by an election,

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it is requisite to show that it was made with full knowledge of all the facts, including the rights of the person in question. And if made under any mistake, misapprehension, or ignorance, it will not be valid. And any person having made an election without such full knowledge and understanding will be entitled to elect again." 2 Redf. Wills, 362. There is in the notes to the above text a full reference to the leading English and American cases.

But it is unnecessary for us to decide whether the receiving of the property and the giving of the receipt amounted to an election to take under the will; for if we should hold that the widow had made an election by which she was estopped, we could not reverse the case for that reason. This action was brought by Eliza A. Prebster, the widow, and Christiana Prebster, the mother of the decedent. These persons were the sole heirs at law of the decedent. By section 25 of the law of descent, the widow took three-fourths of his estate and his mother the remaining fourth. Sec. 25, 1 G. & H. 296. The action might have been brought by Mrs. Christiana Prebster alone. The widow was a proper, but not a necessary, party to the action. Then, as the mother of the deceased had the right to bring the action, and as she charged that the testator was insane at the time when the will was executed, and as the court found he was insane, revoked the probate, and set aside the will as void, what difference can it make whether the widow was or was not estopped? If the court below had found that the widow was estopped, the same judgment would have been rendered in favor of Mrs. Christiana Prebster as was rendered in favor of both the appellees. A judgment rendered on the application of one of several heirs, revoking the probate and setting aside a will as void for want of mental capacity in the testator, has the same legal force and effect as if rendered in favor of all the heirs, for it inures to the benefit of all. When a will is declared void and is set aside, it is void as to all the world. If this suit had been prosecuted by the

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mother of the decedent, against the wishes of the widow, the result would be the same. The widow could take nothing under a void will.

It is, in the last place, earnestly maintained by counsel for the appellants, that the finding of the court is not sustained by the evidence. We have carefully read and duly considered the evidence in the record, and are very clearly of the opinion that the finding is fully supported by the evidence. The evidence very strongly preponderates in favor of the finding. In our opinion, the finding was eminently proper. There is no error in the record.

The judgment is affirmed, with costs.

C. C. Nave and C. A. Nave, for appellants.

L. M. Campbell, for appellees.

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WITNESSES.—*Husband and Wife.*—Evidence.—Will.—On the trial of a suit by husband and wife to contest a will, the latter being an heir at law of the testator, she is a competent witness to testify in her own behalf.

SAME.—*Subscribing Witnesses.*—The subscribing witnesses to a will are competent witnesses, on the trial of an action to set aside the will, to give their opinions as to the soundness of mind of the testator.

NEW TRIAL.—*Reasons for.*—A reason for a new trial assigning generally the improper admission of illegal and irrelevant evidence on the trial, will not be considered by the Supreme Court.

APPEAL from the Hendricks Common Pleas.

PETTIT, J.—This suit was brought by the appellees, John Byram and Hannah Byram, his wife, against the appellant, John D. Call, to contest and set aside the will of Catharine Call, who was the mother of the appellant and of the appellee Hannah Byram, they being brother and sister. The

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causes alleged for contesting the will are the unsoundness of mind of, and undue influence exercised over, the testatrix, Catharine Call. The answer was the general denial. There was a trial by jury and a verdict for the appellees. A motion for a new trial for the following reasons was overruled, exception taken, and judgment that the will was void and setting it aside: first, because the court admitted Hannah, wife of John Byram, to testify as a witness over objection, because she was the wife of her co-plaintiff (and because of the admission of other irrelevant and illegal evidence on the trial); second, because the court misdirected the jury in a material matter of law, in this, "that the subscribing witnesses to the will of Catharine Call, deceased, and the one sought to be set aside, are competent to give their opinion as to the soundness or unsoundness of the mind of the testatrix, but that the jury should take into consideration their means of knowing connected with all the evidence given in the cause, giving such weight thereto as the jury honestly believes the same is entitled to;" and for divers other instructions of law given to the jury in the charge of the court; third, that the verdict is not sustained by the evidence, but is contrary thereto; fourth, because the verdict is contrary to law.

The only legal and proper assignment of error is the overruling of the motion for a new trial, all the others being mere repetitions of the causes for a new trial, and are properly to be considered under that one assignment of error.

Was it error to allow Hannah, wife of her co-plaintiff and heir at law of the testatrix, to testify in her own behalf? Clearly not. If the will should be set aside, then she would inherit, as her own individual property, one-half of all that was left by her mother, the testatrix, and she alone might have maintained this suit without joining her husband. 1 G. & H. 295 (note 2); 1 G. & H. 374, sec. 5.

Her husband might, however, be joined with her without error. 2 G. & H. 41, sec. 8; 8 Ind. 257; 29 Ind. 398 and 570. The last clause of this cause or reason for a new trial

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cannot be considered by us, nor ought it to have been by the court below, because it does not point out or suggest what other irrelevant or illegal evidence was admitted on the trial. 29 Ind. 406; 14 Ind. 322; 26 Ind. 343.

The second reason for a new trial was clearly untenable. The whole instructions are not in the record, and we learn by a brief that this is only a part of the twelfth instruction given. This is not a fair or proper way of presenting a question to this court. If this part of the instruction was not right in itself, it might have been proper in connection with the residue of that and all the other instructions, or at least harmless; but we hold that by itself it was clearly right.

As to the third reason for a new trial, we have only to say that the evidence is somewhat conflicting, but, to our minds, it strongly preponderates in favor of and sustains the verdict and judgment, and we cannot reverse the judgment. I Davis Ind. Dig. 626.

As to the fourth reason for a new trial, that the verdict is contrary to law, we have not been pointed to any law that it contravenes, nor have we been able to find any such law; but on the contrary we believe and hold it to be in wholesome and strict conformity to law and equity.

The judgment is affirmed, at the costs of the appellant.

C. C. Nave and C. A. Nave, for appellant.

L. M. Campbell and R. P. Parker, for appellees.

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39 501
164 430

PRACTICE.—*Supreme Court.*—Assignments of Errors.—Evidence.—An objection to a ruling admitting or rejecting evidence cannot be raised by an assignment of error in the Supreme Court, where it has not been embraced as a reason in a motion for a new trial below.

DAMAGES.—*New Trial.*—Under the code, in actions for injury to the person or

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reputation, a new trial cannot be granted because of the smallness of the damages assessed by the jury, whether they equal the pecuniary injury or not; but in other actions, where the damages assessed do not equal the pecuniary injury, the court may grant a new trial. *Sullivan v. Wilson*, 15 Ind. 246, overruled (WORDEN, J., dissenting).

APPEAL from the Miami Common Pleas.

DOWNEY, J.—The appellant sued the appellees to recover damages resulting from an assault and battery committed by them upon him, in which he alleged that they did, without any cause whatever, beat, bruise, wound, and maim him, by then and there unlawfully, and without any cause whatever, with force and violence, breaking the leg of him, the said plaintiff, and greatly injuring and disabling him by kicking, striking him with clubs, and cutting him with knives; from which he had lost the use of his left leg, his sense of hearing, and had been compelled to pay out and expend, for extra labor and for medical and surgical attendance, the sum of five hundred dollars; wherefore he demanded judgment for ten thousand dollars.

The defendants pleaded separately the general denial. The cause was tried by a jury, and there was a verdict for the plaintiff in the sum of two hundred and fifty dollars.

The plaintiff moved the court for a new trial, for the reasons:

First. For error of law in the giving, by the court, of instruction number four, asked by the defendants.

Second. Misconduct of the jury after their retirement, whereby their verdict was made by other than a fair and impartial investigation of the evidence given at the trial.

Third. The verdict is not sustained by sufficient evidence.

Fourth. The damages assessed are less than the actual pecuniary loss sustained by the plaintiff.

This motion was overruled by the court, and final judgment was rendered on the verdict. There is a bill of exceptions in the record, which contains the evidence and instructions.

The errors assigned are, first, the refusal to grant a new

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trial; second, the giving of improper instructions; third, the receiving of improper evidence offered by the defendants; and, fourth, the rejection of legal evidence offered by the plaintiff.

As there was nothing said in the motion for a new trial about the improper admission or rejection of evidence, no question of that kind can be raised by an assignment of error, as is attempted in the third and fourth assignments. The second assignment is unnecessary. The giving of the fourth instruction was made a reason for a new trial; and the overruling of the motion for a new trial, and assignment of that as error, bring before us the question as to the correctness of that instruction, but not of any other.

We must then examine the reasons which were assigned for a new trial, and determine whether the motion made for the new trial was correctly overruled or not.

The first question relates to the correctness of the charge number four given at the instance of the defendants. We do not find any of the charges given on the application of the defendants in the record, and, in consequence, cannot say whether it was or was not correct.

There is nothing shown in the transcript about any misconduct of the jury.

We think the verdict was sustained by sufficient evidence. Indeed, the appellant himself insists, under his fourth reason for a new trial, that the evidence was more than sufficient to sustain the verdict, and that it should have been larger than it was.

The fourth reason was, that the damages assessed are less than the actual pecuniary loss sustained by the plaintiff. This is the point discussed by counsel in their briefs, and the only point which they do discuss. Counsel for the appellant claims that it was proved that the plaintiff was a farmer, and in consequence of his injuries could not labor on his farm, but had to hire laborers, and board them from the time of the injury until the commencement of the action; that these items amounted to five hundred and seventy dol-

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lars; that his physician's bill was sixty dollars, making, in all, six hundred and thirty dollars; that as the jury allowed him only two hundred and fifty dollars, the amount of the verdict was too small, by three hundred and eighty dollars, to cover or equal the pecuniary injury to the plaintiff. Counsel for the appellees, on the contrary, estimates the amount of the plaintiff's pecuniary injury at not exceeding one hundred and eighty dollars, taking the evidence, as he understands it, as the basis of his calculation.

The outrage upon the plaintiff was cruel, and without any justification. Injuries were inflicted from which the plaintiff will never recover. We are quite sure that the court and jury must have misapprehended the rule of law by which the damages were to be measured; and if we felt at liberty to do so, we should reverse the judgment on account of the smallness of the damages. Looking at the provisions of the code with reference to new trials, however, we find no authority for granting a new trial, in this class of cases, for the reason here assigned.

The fourth reason for granting a new trial is, excessive damages. The fifth is error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property. These are the only reasons having any reference to the amount of the damages or recovery. In addition to this, it is expressly provided, that "a new trial shall not be granted on account of the smallness of the damages in actions for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained." Secs. 352 and 353, Civil Code.

Counsel for appellant, however, refer us to *Sullivan v. Wilson*, 15 Ind. 246. In that case, it is said by the learned judge who delivered the opinion of the court:

"If this section terminated with the word 'reputation,' the construction given by the circuit court would have been unquestionably correct; but the remaining branch of the provision, viz.: 'nor in any other action where the damages

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shall equal the pecuniary injury sustained,' seems to qualify all that precedes it, and, in our opinion, evinces the true intent of the enactment to be, that in all cases of tort, the court is inhibited from granting a new trial on account of the smallness of the damages, in case the damages assessed by the jury 'equal the pecuniary loss.' If this construction be correct, and we think it is, the court, in the exercise of its discretionary power, might, in this case, have granted a new trial, because, as shown by the record, the damages did not 'equal the pecuniary loss.' Indeed, it is difficult to perceive any valid reason why the enactment, in question, should intend a distinction between 'actions for an injury to the person or reputation,' and other actions sounding in tort. We are of the opinion that the court, in its construction of the statute, committed an error," etc.

We are forced to disregard the authority of this case. We are quite clear that the section was intended to and does make a distinction between actions for an injury to the person or reputation and the other actions alluded to when the damages shall equal the actual pecuniary injury. In actions for injuries to the person or reputation, no matter how small the damages may be, whether they equal the pecuniary injury sustained or not, the court cannot, for that reason, grant a new trial. But in the other actions referred to, if the damages do not amount to the pecuniary injury sustained, the court may grant a new trial. We are confirmed in the opinion that this construction is correct from the fact that, as we have seen, no provision is made, among the reasons for a new trial, for granting a new trial in such a case as this for the smallness of the damages. We must, therefore, overrule the case of *Sullivan v. Wilson, supra.*

This construction of the statute leads us to the conclusion that the court committed no error in refusing a new trial for the reason assigned.

The judgment is affirmed, with costs.

WORDEN, J.—I think the case of *Sullivan v. Wilson* should

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be adhered to, and I therefore dissent from the foregoing opinion.

J. M. Wilson, N. O. Ross, and R. P. Effinger, for appellant.

J. L. Farrar, J. Farrar, and Shirts & Mitchell, for appellees.

SLUSSER *v.* RANSOM.

PLEADING.—Draining Association.—Board of Commissioners.—A complaint to enforce a lien for the assessment of benefits under the act entitled "An act to enable the owners of wet lands to drain and reclaim them," etc., (3 Ind. Stat. 228) need not allege that, at the time when application was made to the board of commissioners for the appointment of appraisers, there had been made, by an engineer, a survey and estimate of the cost of construction of the proposed ditch; nor need it state the estimated cost of the work.

APPEAL from the Huntington Circuit Court.

DOWNEY, J.—This action was commenced by the appellant against the appellee to enforce a lien against certain real estate, particularly described in the complaint, for the amount of an assessment of benefits to such lands from the construction of a drain under the act of March 11th, 1867. 3 Ind. Stat. 228.

The defendant demurred to the complaint, assigning for cause, that it did not state facts sufficient to constitute a cause of action; his demurrer was sustained, the plaintiff excepted, and final judgment was rendered for the defendant. This action of the court is the only alleged error. The complaint alleges that at the June term, 1869, of the board of commissioners of the county, upon presentation of an application in writing, a copy of which was filed with the complaint and made part thereof, and marked exhibit "A," he obtained an order from the board of commissioners, a copy of which, marked "B," was also filed and made part of the com-

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plaint, for the construction, digging, and opening of a certain ditch or drain through the real estate of said defendant, which real estate was particularly described in the complaint; that on the 3d day of July, 1869, and pursuant to said order, Lewis Stacker, Samuel Heckman, and Simon Brightmire, who were appointed appraisers to view and locate said ditch and assess the benefits and damages occasioned by the same to all parties therein concerned, and after notice having been given by the plaintiff to said defendant more than ten days before said appraisers proceeded to view said premises, and assess the benefits and damages to said defendant and the other parties, by leaving a true copy of all the proceedings at the last and usual place of residence of said defendant, a copy of which, with the proof of said service, is filed with the complaint and made a part thereof, proceeded to view said ditch and land through which the same was to pass, and assess the benefits accruing to the parties owning the same; that said appraisers assessed upon the land hereinbefore described, belonging to the said defendant Ransom, the sum of two hundred dollars benefits, as set forth in their schedule of assessments, which is duly recorded in the recorder's office, etc., and a copy of which is filed with the complaint, and made part of it, marked exhibit "C;" that after said assessment and location of said ditch, and after the said defendant had sufficient time and due notice of said assessment and location of said ditch to open the same, he having failed so to do, the plaintiff entered upon the premises of said Ransom and opened said ditch or drain through said land, according to the specification in said application to said board of commissioners; that after said ditch or drain was completed, according to the specification as aforesaid, to wit, on the 14th day of June, 1870, he duly demanded of said defendant, Ransom, the said sum of two hundred dollars, which the defendant refused to pay. Prayer for judgment enforcing the lien.

The objection to the complaint, made by the appellee, is

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that it does not allege that the plaintiff had, at the time when he made his application to the board of commissioners for the appointment of the appraisers, had a survey and an estimate made by an engineer of the cost of the construction of the proposed ditch or drain, as required by section seven of the act. It is required by the first section of the act, that the party applying for the appointment of appraisers shall make such application in writing, specifying the character of the work contemplated, its general course, extent, height, depth, width, the amount of fall per mile, the point of beginning and terminus, with a description of lands to be affected thereby, together with the names of the owners of such lands, if the same be known to such applicant, or the name of the occupant of such land, if any there be. Section seven provides that any person desiring, under the provisions of this act, to make application, may employ an engineer and enter upon such lands as may be necessary to make a survey and schedule and an estimate of the cost of construction of such proposed work. It is urged that this last section imperatively requires that there shall be a survey and estimate of the proposed work before the making of the application to the board of commissioners for the appointment of the appraisers. We are not of this opinion. There is nothing in the language of the seventh section which conveys such meaning. If the party applying can state the necessary facts in his application, without a survey, we think he may do so, and dispense with such survey. If he cannot, then section seven authorizes him to enter upon the lands and cause such survey and an estimate to be made. The written application to the board need not state the estimated cost of the work. The appraisers are to estimate the amount which each land-owner shall pay, and these amounts together constitute the total cost of the work. We confine ourselves to the objection made to the complaint, and believing that it was not well taken, we think the demurrer should have been overruled.

The Pittsburg, St. Louis, and Cincinnati Railroad Company *v.* Hennigh.

The judgment is reversed, with costs, and the cause remanded.*

J. R. Slack, for appellant.

H. B. Sayler, S. E. Perkins, and *S. E. Perkins, Jr.*, for appellee.

*Petition for a rehearing overruled.

39	508
161	159
<u>j 161</u>	<u>185</u>

THE PITTSBURG, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY *v.* HENNIGH.

NEW TRIAL.—Reasons For.—“Error of law, which occurred at the trial, and was excepted to at the time by the defendant,” is too general and indefinite to be assigned by a defendant as a reason for a new trial.

RAILROAD.—Tickets.—Damages.—A passenger on a railroad train gave to the conductor his ticket from C. to N., but the conductor gave him no check in return; before reaching N., there was a change of conductors, and the new conductor expelled the passenger for want of a ticket or check.

Held, that the railroad company was liable in damages to the passenger, and that the Supreme Court could not disturb a verdict for five hundred dollars, in such a case, on the ground that the damages were excessive.

APPEAL from the Delaware Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant to recover damages for the ejection of the plaintiff from the railway carriage of the defendant by her agent and servant, the conductor of a train, at the town of Windfall, in the State of Indiana, the plaintiff having purchased a ticket at Chicago for passage from that place to New Castle, in the State of Indiana.

Issue, trial, verdict and judgment for the plaintiff for five hundred dollars. No question was made on the pleadings. The defendant moved for a new trial, and filed the following reasons: “first, the verdict of the jury is not sustained by the evidence, and is contrary to law; second, the damages found by the jury are excessive; third, for error of law,

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which occurred at the trial, and was excepted to at the time by the defendant."

These reasons present the only question arising in the case. We are not of opinion that the judgment should be reversed for anything that can be properly urged under the first and second reasons for a new trial. It was established, by a fair preponderance of the evidence, that the plaintiff purchased a ticket at Chicago for passage from that point to New Castle, in the State of Indiana, exhibiting his ticket to the baggage master at Chicago, and having his trunk checked to New Castle.

The plaintiff took a seat in the railway carriage, and soon after leaving Chicago the conductor took up his ticket, but without giving him any check, or anything showing that he was entitled to be carried to New Castle. Before arriving at the town of Windfall, there seems to have been a change of conductors, and the plaintiff having nothing to show that he had paid his passage to New Castle, except, perhaps, his check for his trunk, and refusing to pay any further fare, he was required to leave the train at the town of Windfall; by the new conductor. This occurred about three o'clock A. M. The plaintiff's trunk went on to New Castle, and the plaintiff himself arrived next day, by another train.

A case was made out, by a preponderance of evidence, that clearly entitled the plaintiff to recover, and we are not of opinion that the damages assessed are so clearly excessive as to authorize us, under the well-settled and long-established practice of this court, to disturb the verdict on that ground.

The third reason for a new trial raises no question for consideration. It pointed out nothing in particular for the consideration and action of the court below. The "error of law which occurred at the trial" might have had reference to the introduction or rejection of evidence, to the giving or withholding of charges, or to any one of a multitude of questions that may arise in the progress of a trial. The object of filing written reasons for a new trial is to apprise the

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court and the opposite party of the grounds upon which a new trial is asked, and they ought to be sufficiently specific to accomplish that purpose. Such a reason as that under consideration has been held, in numerous instances, to be insufficient. *Barnard v. Graham*, 14 Ind. 322; *Medler v. Hiatt*, 14 Ind. 405; *Snodgrass v. Hunt*, 15 Ind. 274; *Ham v. Carroll*, 17 Ind. 442; *Horton v. Wilson*, 25 Ind. 316.

The judgment below is affirmed, with costs.

E. Walker, for appellant.

J. H. Mellett and W. March, for appellee.

WHITLOCK v. VANCLEAVE ET AL.

39	511
140	580
39	511
152	164

NEW TRIAL.—As of Right.—Costs.—In ejectment, the payment of the costs by the losing party within a year after judgment is a condition precedent to the granting of a new trial as of right.

SAME.—The court cannot limit the time within one year after judgment, given by statute, for the granting of a new trial upon payment of costs.

SAME.—A new trial cannot be demanded or granted, as of right, under the statute, until after judgment has been rendered.

SAME.—After judgment in ejectment, and until a new trial has been granted, there is nothing to try in that action, and the party then making costs must pay them.

SAME.—Notice.—The party applying for a new trial as of right, in ejectment, need not notify the opposite party of his intention to do so.

SAME.—Where a party, against whom a judgment in ejectment is rendered, pays the costs, applies for and obtains a new trial at the same term at which the judgment is rendered, he need not notify the other party or parties, as they are then required to take notice of the order vacating the judgment and ordering the new trial; but, if a new trial is applied for and obtained at a term subsequent to the rendition of the judgment, then the party to whom the new trial is granted is required to serve notice, that he has obtained a new trial, on the other party or parties, ten days before the first day of the next term of the court, at which the action stands for trial.

APPEAL from the Montgomery Circuit Court.

BUSKIRK, C. J.—This was a proceeding to enjoin the col-

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lection of certain costs. The court below sustained a demurrer to the complaint, and this is assigned for error.

The facts upon which an injunction was sought were these: The appellant, at the September term, 1865, of the Montgomery Circuit Court, commenced an action against the appellee Vancleave, to recover the possession of a tract of land. The cause was tried at said term by a jury, and resulted in a finding for the defendant. The plaintiff thereupon moved the court for a new trial as a matter of right, and the court entered an order that a new trial would be granted on the condition that the costs were paid in one hundred and twenty days therefrom. The costs were not paid within the time limited. The defendant, after the expiration of the time limited for the payment of the costs, but before the March term, 1866, caused subpoenas to be issued and a large number of witnesses to be summoned to appear and testify as witnesses on behalf of the defendant, in the trial of said cause at said term of court. The costs thus created amounted to one hundred and six dollars and thirty-six cents.

At the March term, 1866, the court, upon the motion of the defendant, rendered judgment on the verdict which had been rendered at the previous September term. At a subsequent day of the said March term, the plaintiff in said action presented to the court her petition, showing that she had paid the costs of the former trial, and asked the court to set aside the judgment and grant her a new trial as of right. The court thereupon set aside the said judgment and granted a new trial.

At the September term, 1866, the defendant, upon an affidavit showing that the above costs were unpaid, moved the court to set aside the order granting a new trial. The defendant in said action, on the 8th day of December, 1870, caused and procured the clerk of the said court to issue a fee bill against the plaintiff for the said costs created as aforesaid at the March term, 1866, which was delivered to the sheriff of the said county.

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At the March term, 1871, the plaintiff applied to the said court for an injunction restraining and perpetually enjoining the appellees from collecting the said costs from the appellant. The appellees demurred to the complaint. The court sustained the demurrer, to which the appellant excepted; and the appellant refusing to plead further, the court rendered final judgment for the appellees. The appellant prayed an appeal to this court, which was refused by the court. The appellant afterward filed a transcript and obtained a *supersedeas*.

Did the court err in sustaining the demurrer to the complaint? The solution of that question depends upon which party was liable for the costs created at the March term, 1866. The original cause was tried at the September term, 1865, and a verdict was found for the defendant. The court did not then render a judgment upon the verdict, but upon the motion of the appellant for a new trial, as of right, continued the cause, giving to the appellant one hundred and twenty days in which to pay the costs of the former trial. The appellant failed to pay the costs within the time limited, and the appellee Vancleave, after the expiration of the one hundred and twenty days, but before the first day of the March term of said court, caused to be issued by the said clerk a subpoena for witnesses which was delivered to the sheriff, who summoned a large number of witnesses to attend and testify upon the trial of said cause.

All the proceedings had in said cause at the September term, 1865, subsequent to the rendering of the verdict, were irregular, illegal, and void. The appellant had no right to demand a new trial, as of right, until she had paid all the costs of the former trial. The court had no power to limit the time within which the costs should be paid. That is regulated by statute. The appellant had the right within one year after the rendition of the judgment to apply for and obtain an order setting aside the judgment and granting a new trial, upon showing that all the costs of the former

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trial had been paid. The court possessed the power to require the appellant to pay such damages, in addition to the costs, as would be occasioned by such new trial. But no damages are to be paid unless the court so directs. The court should have rendered judgment on the verdict of the jury at the September term, 1865. A party cannot demand a new trial, as of right, until after judgment has been rendered upon the finding of the court or the verdict of the jury.

It has been several times decided by this court that the party must not only apply for, but must actually obtain the order of the court vacating the judgment and ordering a new trial, within one year from the time when the judgment was rendered. Until such order was made there was nothing to try, and consequently there was no necessity for witnesses. It is not necessary that the party applying for a new trial, as of right, should notify the opposite party of his intention so to do. If the party against whom a judgment has been rendered pays the costs of the former trial, and applies for and obtains the order of the court vacating the judgment and ordering a new trial, at the same term of court that the judgment is rendered, then the opposite party is required to take notice of the order vacating the judgment and ordering the new trial; but if the new trial is applied for and obtained at a subsequent term, then the party obtaining such new trial is required to notify the other party or parties that he has so obtained a new trial, and this notice must be served ten days before the first day of the term at which the action stands for trial. If the appellant had paid the costs and obtained the order for a new trial at the September term, 1865, the cause would then have stood for trial at the March term, 1866, and the defendant therein would have been required to prepare for trial at such term without any actual notice. He was in court at the time when the cause was tried, and was chargeable with notice of all that was done in his cause. But as the new trial was not obtained until the March term, 1866, the cause did not stand

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for trial at that term. It would have stood for trial at the September term, 1866, if the defendant had been notified ten days before the first day thereof. When a party has received constructive notice by being in court, or actual notice, that the judgment has been vacated and a new trial ordered, he is required to prepare for another trial of the cause; and until he is thus notified he has no right to have witnesses summoned, and if he does, he must pay the expense and costs created thereby. See sections 601, 602, and 603, of the code, 2 G. & H. 283.

It necessarily results from what we have said, that the court erred in sustaining the demurrer to the complaint. The appellant was required, as a condition precedent to obtaining a new trial, to pay the costs of the first trial. The costs created after the new trial was granted, and the opposite party was notified in either of the modes above indicated, would abide the event of the suit. All other costs must be paid by the party creating them.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

S. C. Willson and L. B. Willson, for appellant.

WHITMAN, RECEIVER, *v.* WELLER.

SUPREME COURT.—*Record.*—*Agreement.*—As a general rule, counsel cannot, by agreeing to a change of the record on appeal, present to the Supreme Court a question different from that which appears by the record to have been decided in the court below.

PRACTICE.—*Inspection of Books and Papers.*—Section 306, 2 G. & H. 191,

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relates simply to obtaining, by rule or order of court, inspection and copy of a book or paper in the hands of a party, without any reference to its production in court.

SAME.—*Production of Books and Papers in Court.*—Under section 305, 2 G. & H. 191, to justify an order for the production of a book or paper, it should be shown to be in the hands of the party against whom such order is asked.

SAME.—*Order of Court.*—An order for the inspection or production of a book or paper in the hands of a party should specify and designate with reasonable certainty the book or paper, that such party may know what book or paper is to be inspected or produced.

SAME.—An order to inspect or produce books or papers should not be made in such terms as to license the party obtaining it to search the books and papers of his adversary at pleasure; nor should an order be made to produce books or papers which may be of no use when produced.

SAME.—*Motion.*—Upon a motion to produce in court certain books and papers, the court cannot order generally all the books and papers of a corporation to be produced.

SAME.—*Copies of Documents.*—If a copy of books or papers, or the parts thereof shown to be material, be furnished under order of court, with consent to its use as evidence, the court need not, except for special reasons, compel the production of the originals.

SAME.—*Dismissal of Action.*—The court may dismiss the action of a party refusing to obey an order to produce a book or paper.

APPEAL from the Allen Common Pleas.

DOWNEY, J.—This action was instituted by the appellant against the appellee on a premium note given by him to the insurance company, of which appellant was receiver. The action was dismissed by the court, over the objection of the plaintiff, and he excepted and put the facts on which the court acted in the record by a bill of exceptions.

A written motion was filed by the defendant, as follows:

"The defendant moves the court for an order on the plaintiff for the production in this court, and for an inspection, of the original books of said Sinnissippi Insurance Company, and copies of the same, in relation to the said assessments referred to in the complaint; also the amount of premium notes heretofore held, or now held, by said company, what notes have been compromised and settled, the losses by fire allowed and entered on said books, the amount previously assessed and collected upon the premium

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notes of the defendant and other members of said company; also the amount of expenses and costs entering into and forming part of the assessment of twenty per cent. ordered to be made by the court appointing said receiver."

This motion was supported by an affidavit of the defendant, stating "that he verily believes he has a good defence to this action; that material to said defence are the books of the said insurance company, showing the assessments referred to in the complaint in this case; also showing the amount of premium notes held by said company at the date of the appointment of said receiver and the amount now held; also the amount paid on the same, the amount of said notes heretofore compromised and settled; also showing the losses by fire allowed and entered on said books, the amount of all assessments and collections upon the premium notes held by said company, including that of this affiant; also the amount of expenses and costs which have entered into and made a part of said assessments; also the amount of expenses and costs entering into and forming a part of said assessment of twenty per cent., ordered to be paid by the court appointing said receiver. Affiant further says that he believes that said books will show that said receiver has no cause of action against this defendant, and that he cannot show said facts by any other evidence; and he further says that he verily believes that said books are in the possession and under the control of said plaintiff."

On this application, as the bill of exceptions shows, the court ordered that the plaintiff should produce in open court, within ten days, all the books of the said corporation. Counsel have, however, by agreement, amended or changed that part of the record reciting the bill of exceptions, so as to make it show that the court ordered the production in court of "the books containing the records called for by the defendant's motion" only.

The plaintiff offered, in discharge of the rule, certain transcripts of assessments from the books of the company, which the court held insufficient, and on the defendant's mo-

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tion, for disobedience of the rule, dismissed the plaintiff's action.

We think we must look to the bill of exceptions, as certified by the judge of the court from which the appeal is taken, to ascertain what was decided, and what the order was, which was made by that court, and we must decide whether that order was or was not correct. As a general rule, counsel cannot, by consenting to a change of the record, present to this court a question different from that which was decided below. This court sits to review legal questions which have been decided by the courts from which appeals are taken, and not to decide questions presented here for the first time.

Section 306 of the civil code is as follows:

"The court, or a judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection and a copy of any book or part thereof, paper or document in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein; if compliance with the order be refused, the court, on motion, may exclude such evidence, or punish the party refusing, or both."

Section 305 provides, that "the court or judge thereof may, upon motion, compel by order, either party to produce, at or before the trial, any book, paper, or document in his possession or power; the order may be made upon application of either party, upon reasonable notice to the adverse party, or his attorney,—if not produced, parol evidence may be given of their contents." 2 G. & H. 191.

These sections relate to different things. The 306th relates simply to the obtaining of an inspection and a copy of the book or paper, without any reference to its production in court. The 305th section relates to the production of the book, paper, or document in court, at or before the trial.

The right to inspect private books and papers is sometimes an important one in the administration of justice, and yet the exercise of it is of such a delicate nature, that the

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courts should carefully guard against its abuse. If a party has good reason to believe that a book or paper in the possession of his adversary contains evidence in his favor, and his adversary refuses to allow an inspection of it and the taking of a copy, the court may, on a proper showing, compel the adversary to allow such inspection and copy. I Greenl. Ev., sec. 559. If the document or book be one which, for reasons of public policy or other sufficient reason, the party should not be compelled to exhibit, the exemption may be shown in answer to the rule or order.

To justify an order, under section 305, for the production of a book or paper, it should be shown that the book or paper is in the hands of the party against whom the order is asked. The order should specify, with reasonable certainty, the book or paper which is to be produced. It has been held by this court, that the court may, as a punishment of a party disobeying such an order, dismiss his action. *Silvers v. The Junction Railroad Company*, 17 Ind. 142.

It is quite clear that the order in this case cannot be sustained. The court could not, under the motion and showing which were made, order the production of all the books of the corporation. And then, again, we are of the opinion that the motion and affidavit did not sufficiently designate the books which were to be produced. An order, either for the inspection of books and making copies, or for their production in court, should so specify or describe them, that the party who is to furnish inspection or produce the books may know what books are to be inspected or produced. The order should not be made in such terms as to operate as a license to the party obtaining it to search the books and papers of his adversary at pleasure, or to require him to produce books which may be of no use when produced.

If a copy of the book or paper, or the part shown to be material, has been furnished, or shall be furnished, under the order of the court, with consent to its use as evidence, the court need not, except when special reasons exist, compel the production of the original. Bicknell Civ. Pr. 306. If

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it be impossible or improper for the party against whom the order has been made to produce the book or paper, the facts may be shown, as we have seen, in discharge of the rule.
1 Greenl. Ev., sec. 559 and note 5.

In this case, the copies produced were not a sufficient compliance with the rule. But the order made was erroneous, for the reasons stated, and it was therefore wrong to dismiss the plaintiff's action for non-compliance with it.

The judgment is reversed, with costs, and the cause remanded, with instructions to reinstate the case, and for further proceedings.

WORDEN, J., having been of counsel in the cause, was absent.

A. Zollars, F. E. McDonald, F. M. Butler, and E. M. McDonald, for appellant.

W. H. Coombs and W. H. H. Miller, for appellee.

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RAILROAD.—Appropriation to by County.—Time.—Good Faith.—The eighteenth section of the act, entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," 3 Ind. Stat. 389, requires the railroad company to which an appropriation has been made by a county to commence work upon the railroad in such county, in good faith, within one year from the time of the levy of the tax therefor, unless time has been given.

SAME.—Tax.—When the railroad company fails to commence work in good faith upon the railroad within one year from the levy of the tax, the tax-payer is discharged from his obligation to pay the tax, and no proceeding will lie to require the auditor to place the tax upon the duplicate or take any other steps to collect the same.

SAME.—Board of Commissioners.—The board of commissioners can levy a tax in aid of the construction of a railroad at their June session only.

SAME.—Time of Levy.—The tax is levied when the board of commissioners orders that the tax specified be levied, and not when the tax thus levied is placed upon the tax duplicate by the auditor.

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SAME.—The time within which the railroad company must commence work upon the railroad in the county, in order to avail itself of an appropriation by the county, commences from the time when the order levying the tax is made by the board of county commissioners and not from the time when the levy is placed on the tax duplicate.

SAME.—“*Commencing Work.*”—*Right of Way.*—*Letting Contract.*—By acquiring the right of way or letting contracts for the construction of a railroad, a railroad company does not “commence work upon the railroad.”

SAME.—*Constitutional Law.*—BUSKIRK, C. J., concurring, held, further, that the aid to be furnished to incorporated companies by counties is limited to the taking of stock, by section 6, article 10, of the constitution of the State.

SAME.—*Election.*—*Board of Commissioners.*—DOWNEY, J., concurring, held, further, that under the statute authorizing aid to the construction of railroads, the question whether a county shall aid the construction of a railroad by donation of money or by taking stock of the railroad company, cannot be submitted to the election of the voters, but is for the board of county commissioners only to decide, after the money has been collected by taxation.

APPEAL from the Decatur Common Pleas.

WORDEN, J.—A petition, signed by over one hundred free-holders of Decatur county, was filed before the board of commissioners of said county, setting forth that the Toledo and Louisville Railway Company was a company legally organized under the laws of the State of Indiana, for the purpose of constructing a railroad from New Castle, in Henry county, to North Vernon, in Jennings county, passing through said county of Decatur, and requesting said board to make an appropriation of one hundred thousand dollars, by a tax upon the amount of the taxable property of said county, as a donation, for the purpose of aiding said company in the construction of said road through said county of Decatur. The board, having taken the petition under advisement, ordered the polls to be opened on the 29th day of January, 1870, in order that a vote be taken “upon the question of appropriating money by the county for the purpose of aiding in the construction of said railway, as prayed for in said petition.” Due notice was accordingly given to the voters that, on the day specified, a vote would be taken “on the question of donating one hundred thousand dollars to aid in the construction of the Toledo and Louisville Railway, running from New Castle, in Henry county, to North

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Vernon, in Jennings county, passing through said county" (of Decatur). At the election thus held there was a large majority in favor of the donation.

To provide for the donation, the board of commissioners, at their June session, 1870, ordered that there be a levy of fifty cents on each hundred dollars of real and personal property in Decatur county, Indiana, for said appropriation to aid the said Toledo and Louisville Railway Company, to be placed upon the duplicate of 1870; and at their June session, 1871, the board made a like order that fifty cents on the hundred dollars valuation be placed upon the duplicate of 1871.

On the 8th of September, 1870, the board entered upon their order book the following order, viz.:

"Ordered, by the board, that the auditor is hereby commanded to withhold from the tax duplicate of Decatur county, Indiana, the tax levied for the aid in the construction of the Toledo and Louisville Railroad, until such time as there is a prospect of the work of construction being commenced."

- On the 30th of September, 1871, the board entered the following further order, viz.:

"Ordered, by the board, that the order heretofore made by this court at their regular June session, 1871, and entered of record on page 147 of this book, making a levy of fifty cents on each hundred dollars of taxable property in this county, to be placed upon the tax duplicate for the year 1871, for the purpose of aiding in the construction of the Toledo and Louisville Railway by a donation to said corporation, be and the same is hereby revoked."

The tax has never been placed upon the tax duplicate, and the auditor declines to place the same upon the duplicate, although he has been requested to do so by the relator, who is a tax-payer of the county and one of the signers of the petition asking for the donation.

This suit was instituted by the appellant against the appellee, on the 14th of March, 1872, to compel the latter, by

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way of mandate, to place the tax upon the duplicate, to be collected. The petition for the writ was duly verified, and set out all the proceedings in full.

The defendant demurred to the petition, for the reason that it did not state facts sufficient, etc., but the demurrer was overruled, and he excepted. He then filed an answer to the writ or petition, alleging, amongst other things, "that twenty months or more have elapsed since said election, twenty-one months since said first levy, and nine months since the second, as shown by said affidavit; that said Toledo and Louisville Railway Company has never, at any time since its organization, filed any map or profile of its proposed route in the office of the clerk of said county of Decatur, nor any other public office in said county; nor has it expended to exceed fifty dollars for work done thereon in said county; nor is said road so constructed as that trains of cars pass over the same in any portion of said county; but, on the contrary, said railroad company has failed to commence work upon said railroad in said county, in good faith, and the board of county commissioners have not extended the time to complete the same, nor is the work progressing thereon, although the said periods of time have elapsed since said election and the levies of said taxes. Said respondent has been informed that the officers of said company did procure some few feet of grading to be done about the 14th day of June, 1871, to avoid a forfeiture of said donation, but not on any line regularly adopted by said company; which is the only work ever done on the same in said county, as affiant is informed and believes. Said respondent therefore says that he is advised by counsel and directed by the board of county commissioners, whose clerk he is, not to put upon the tax duplicate, now in process of preparation for 1872, any part of said taxes so levied as aforesaid, because it would encumber the duplicate with a tax, the collection of which cannot be enforced; that said company has no right to demand the collection of said taxes; and that an effort at their collection would be attended with serious and troublesome litigation,

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and involve an unnecessary expense to said county; wherefore," etc.

To this pleading the plaintiff demurred, assigning for cause that it did not state facts sufficient, etc., but the demurrer was overruled; exception.

The plaintiff replied, alleging that the railroad company had located the line of her road, setting out the manner of such location, and had, within a year from the 14th day of June, 1870 (the date of the first levy), procured rights of way, let contracts for work on the road, and in good faith, and with a view to the building and construction of said railroad, done work in the way of grading and grubbing upon the line of the road as thus located, in said county of Decatur. The defendant filed a denial of this pleading. Perhaps the denial was unnecessary, but if so, it did no harm.

The cause was submitted to the court for trial on the issue joined. Finding and judgment for the defendant, a new trial being denied the plaintiff.

There are seven errors assigned, which need not be set out in detail. We will notice such points as are relied upon for a reversal. It is claimed by the appellant that the answer or return to the writ did not state facts sufficient to bar the relief sought, and, therefore, that the demurrer thereto should have been sustained.

We think it is sufficiently alleged in the answer, that the railroad company failed to commence work, in good faith, upon the railroad in said county within one year from the time of the levy of the tax, to wit, the 14th of June, 1870. If this fact is material, it is by no means clear that the commencement of the work within that time was not a necessary allegation in the petition. It is alleged, however, in the reply, and this seems to have been the material issue in the cause.

Was it necessary that the work should have been thus commenced, in order to the maintenance of the action?

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The 18th section of the statute, under which the proceedings were had (3 Ind. Stat. 394), is as follows:

"Sec. 18. A failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax, or failure to complete such railroad ready for use within three years from such levying, shall forfeit the rights of such company to such donation, unless the county commissioners, for good cause shown, shall give not to exceed one year's further time in which to complete the same, and the money raised by said special tax shall go into the general funds of the county or township, as the case may be, and be used accordingly."

We are of opinion that under this provision, where the railroad company fails to commence the work within the time specified, the tax-payer is released and discharged from his obligation to pay the tax, and, therefore, that no proceeding will lie to require the auditor to place the same upon the duplicate, or to take any other steps to collect the same. We need not, and do not, decide what would be the rule in cases where some of the taxes have been paid before the forfeiture, and others have not been paid; as in this case, none of the taxes have been paid, and there can be no inequality injuriously affecting the tax-payers.

It is unnecessary to determine whether the board of commissioners could extend the time for the commencement of the work, as it does not appear that that body made any such extension.

But it is claimed that the tax was not levied until it was put upon the duplicate for collection, and, therefore, that the year does not commence running until it is thus placed upon the duplicate. We are of a different opinion. The levy was made by the order of the board of commissioners on the 14th of June, 1870. The levy can only be made by the board, and it must be made at the June session. The work of placing the tax thus levied upon the duplicate is to be afterward performed by the auditor. The work of making

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out the tax duplicate, is no part of the levying of taxes.

We are of opinion that the answer was good.

It is claimed that, on the trial, the court erred in admitting improper, and in excluding proper, evidence. The evidence admitted, claimed to be improper, was offered by the defendant, as to whether the railroad company had filed in the proper office a map and profile of her road, and as to whether there had been any meetings of the board of directors of the railroad company within specified times. If there was any valid objection to the evidence, it was on the ground of irrelevancy, and we cannot see that the plaintiff was in any way injured or prejudiced thereby. If the court committed an error in this respect, it was a harmless one. The excluded evidence was offered by the plaintiff, being a map purporting to be a delineation of what we take to be the railroad. It was not shown to have been made by the company, or to have been authorized, or in any way adopted by it. We think there was no error in excluding the map.

The only remaining question relates to the sufficiency of the evidence to sustain the finding. We think, upon an examination of the evidence, that we should not disturb the finding. There was evidence that rights of way had been acquired by the company in Decatur county within a year after the levying of the taxes. But the acquiring of the rights of way is not, in our opinion, "work," within the meaning of the section of the statute above cited. The right of way had to be acquired before the company could legitimately "commence work upon the railroad." The company also let a contract for the doing of some work upon the railroad. But letting a contract for the performance of work and the commencement of work, we take to be different things.

There was a little plowing and scraping done by the contractor within the year. This was evidently done with a view to save the forfeiture. He was to be paid for his work and for smoothing down the ground again if the road should

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not be built. He got a "monkey wrench and some other things," but has had no settlement for his work.

We cannot say, from the evidence, that the work was, in good faith, commenced upon the railroad within the year, as required by the statute above cited. Had the court below found the other way, we might not have felt called upon to disturb the finding on the question of fact. The finding, as it is, is not manifestly wrong, and we cannot disturb it.

The judgment below is affirmed, with costs.

BU SKIRK, C. J.—I concur in the foregoing opinion, but am of opinion that judgment was rightfully rendered for the defendant for the further reason that the whole proceedings, contemplating a donation by the county to aid in the construction of the railroad, were without competent authority, and void. In my opinion, the 6th section of the 10th article of the constitution, limits the aid to be furnished by a county to any incorporated company to the taking of stock therein. My views on this point are more fully stated in the case of *The Lafayette, Muncie, and Bloomington R. R. Co. v. Geiger*, 34 Ind. 185.

DOWNEY, J.—Being of the opinion that the proceedings which resulted in the levy of the tax in question were fatally defective, I concur in the conclusion that the case was rightly decided for the appellee by the common pleas, for this reason, in addition to the reason given in the main opinion: The petition prayed the board of commissioners to make an appropriation of a designated amount by way of donation. The board ordered an election to determine whether there should be an appropriation of the amount as prayed for in the petition, or not. The notice given informed the voters that they were to vote on the question whether the amount should be donated or not. This, I think, was a fatal departure from the requirements of the statute. The petition must ask for an appropriation simply. Sec. 1. The order of the board must be for the holding of an election

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upon the subject of appropriating money by such county. Sec. 2. The notice must conform to the petition and the order of the board. Sec. 3. When the vote is taken, it must be "for the railroad appropriation," or "against the railroad appropriation." Sec. 6. After the money has been collected, the board of commissioners decide whether the money shall be applied to the taking of stock, or by way of donation. Sec. 14. When, as in this case, the question of donation alone is submitted to vote, it is without authority of law; it would take away from the commissioners the power of choice which the law vests in them, and which they are to exercise after the money shall have been collected, and is a clear departure from the statute. It would follow, if I am right in this conclusion, that the question of subscribing for stock could no more be submitted to the voters than that of donating the money. This view of the question was indicated in the opinion in the case of *The Lafayette, etc., R. R. Co. v. Geiger, supra*, as entertained by me. It seemed to me proper, if not necessary, that I should, in this case, state my convictions at a little greater length, and in my own language.

H. Crawford, D. T. Wright, J. Gavin, J. D. Miller, J. S. Scobey, and O. B. Scobey, for appellant.

S. A. Bonner, C. Ewing, and J. K. Ewing, for appellee.

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DEED.—*Husband and Wife.—Purchase-Money.*—A deed executed by a husband directly to his wife, in good faith, and in consideration of money of the separate estate of the wife, used by the husband in the purchase of the land conveyed by him to his wife, is valid, and was so held in an action for partition by the children of such a wife, deceased, as her heirs at law, against the husband.

JURISDICTION.—*Title to Real Estate.—Court of Common Pleas.*—In an action for partition between heirs, where the title to land as derived by a deed executed

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by a husband directly to his wife is in issue, the court of common pleas has jurisdiction to try and determine such issue as incident to the action.

WITNESS.—Heirs.—In an action for partition, where the petitioners claimed title to land by descent, as heirs of their mother, who, in her lifetime, was the grantee of a deed for said land, executed directly to her by her husband, and said husband, as defendant, in answer to the petition for partition, specially denied any title in the petitioners as derived from said deed; *Held*, that the action was both by and against heirs, and founded on the deed, within the meaning of the statute (3 Ind. Stat. 560, sec. 2) declaring parties incompetent as witnesses “in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way.”

OPEN AND CLOSE.—The defendant having specially denied the title of the plaintiffs and their right to partition although he admitted the execution of the deed *Held*, that the plaintiffs were entitled to open and close.

APPEAL from the Montgomery Common Pleas.

DOWNEY, J.—This was a petition for the partition of certain real estate by the appellees against the appellant. Issue was joined, there was a trial by the court, and a finding for the petitioners, motion for a new trial by the defendant disallowed, and final judgment for partition. The defendant appeals and has assigned two errors; first, that the court erred in overruling his demurrer to the complaint; and, second, in refusing to grant him a new trial. It is alleged in the petition, that on the 25th day of June, 1867, the said Larkin Thompson, who was then the husband of Sarah Thompson, since deceased, conveyed to said Sarah Thompson, by deed, in fee simple, the real estate in question; that the consideration for said conveyance was the sum of eight hundred dollars, received by said Larkin from said Sarah, which sum was her own separate interest, and was received by her from the estate of her deceased father, and a portion of which sum the said Larkin used in the purchase of said tract of land; a copy of the deed being made part of the complaint and filed with it; that the deed was executed by the said Larkin and received by the said Sarah in good faith and for the consideration therein expressed; that on the 5th day of June, 1868, the said Sarah Thompson died, intestate, seized

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of said land by virtue of said deed of conveyance, and leaving surviving her, as her sole heirs at law, the said plaintiffs, William B. Mills, George L. Mills, and Annie Bowman, late Mills, intermarried with Samuel Bowman, her children by a former marriage, and also Larkin Thompson, her husband, she having had no children as the fruit of her marriage with the said Larkin; that each of said children is the owner of one-third of two-thirds, and said Larkin is the owner of the other one-third of said land, which they hold as tenants in common. Prayer for partition, or if the land cannot be divided, that it may be sold, etc. The deed, a copy of which is filed with the complaint, commences as follows: "By this deed, I, Larkin Thompson, of," etc., "convey and warrant to Sarah Thompson, of," etc., "in consideration of the sum of eight hundred dollars received by me of her money, which she received from her father in 1857, which I applied and used in the purchase of the land or lot hereinafter described, the following real estate," etc.

The defendant demurred to the petition on two grounds; first, that it did not state facts sufficient to constitute a cause of action; and, second, that the court had no jurisdiction of the subject of the action. The demurrer was overruled by the court, and the defendant excepted.

He then answered admitting the execution of the deed mentioned in the complaint, but alleging that the deed was wholly void and of no effect; that the plaintiffs have no right or ownership in said land, and have no right to partition thereof on account of the following facts: that at the time, and long before the execution of said deed, said Sarah was the wife of this defendant. He denies that he received for his own separate use any sum of money of or from her by virtue of his marriage with her, or that he used any money belonging to or obtained from her in the purchase of said land; that she was a widow with three children in limited circumstances at the time of the marriage; that he was then in far better circumstances than she; that in consequence of her feeble health, and members of the family, his property

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was largely expended in caring for their family; that whatever money was received by her from her father's estate or from any other source during their coverture was used by them jointly for common benefit, without agreement, express or implied, between them that he was to account for the same to her; and that it was not used in the purchase of said real estate; that all the money of her separate estate that he ever received did not amount to more than six hundred dollars, and that it was all expended for the family, as above stated, with her full knowledge and consent, long before the purchase of said land; that about the time of the purchase of said lot, this defendant began to be oppressed with debts and the expenses of his family on account of sickness, and was thereby likely to be broken up; that these facts came to the knowledge of his wife and very greatly troubled her, and made her afraid that she would be turned out-of house and home; that she began to importune him to convey said land to her, the same being all the property he then had left; that to quiet her and keep her at peace, and to rid himself of her importunity, he caused the deed to be made, paying no attention to its terms or statements or the consideration thereof, hoping thereby to render her contented, and for the sole purpose of quieting her fears and apprehensions, and thereby relieve her while in bad health, and without any other consideration whatever, and that there was no other consideration whatever for said deed; that said land was all the property owned at the time by the defendant, except personal property of the probable value of two hundred dollars, and which was not more than sufficient, if it was sufficient, to pay his debts; that he paid for said land wholly with his own means and labor, and it is his in law and equity. Wherefore he prays judgment of the court that said deed may be held and adjudged void and of no validity; that said plaintiffs have no right to said land and are not entitled to partition thereof, etc. Issue was taken on this answer by a general denial thereof.

Taking up the questions as they are presented by counsel,

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the first relates to the sufficiency of the complaint. It is objected, first, that the complaint does not state facts sufficient to constitute a cause of action. It is assumed that the deed from the appellant to his wife for the real estate in question is void, because it was made by a husband directly to his wife, and that, to render it valid, the complaint must state affirmatively such a state of facts as will warrant a court of equity in establishing and giving validity to it as a conveyance. Counsel for the appellees answers this position by saying that it is shown that a full and valuable consideration was paid for the land, and that this alone, without any further allegation, is sufficient to warrant the court in holding that the deed is valid in equity. The complaint and the deed, a copy of which is filed with it, fully show the existence of a valuable and sufficient consideration for the conveyance of the land, and it is alleged that the deed was made by Larkin Thompson, and received by said Sarah Thompson, in good faith. We must, for the purpose of deciding upon the sufficiency of the complaint, regard these matters as true. The distinction, made and discussed in this and other cases between the deed from husband to wife, when considered by a court of law and when considered by a court of equity, is more imaginary than real, so far, at least, as concerns the courts of this State. Why the same instrument should be regarded by one court as nothing and by the other as valid and effective as a conveyance of the title, is not easily seen; and yet such was the law. *Doe v. Hurd*, 7 Blackf. 510; *Fletcher v. Mansur*, 5 Ind. 267; *Fritz v. Fritz*, 23 Ind. 388. In this State, the distinction between actions at law and suits in equity, and the forms of all such actions which existed in this State prior to 1852, are abolished; there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, and every right, and every transaction, must be at once regarded by the court in its equitable, as well as in its legal, character and operation. Why then shall we longer speak of the same instrument as being void at law, but valid

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in equity? As the fact is recognized that the husband may, by deed, make directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties, that is, hold them valid until some legal reason has been shown for setting them aside? In the case under consideration, as there appears to have been a valuable and sufficient consideration, why go into an inquiry, in the first instance, to determine whether the husband intended to defraud his creditors, since they are making no complaint? Why examine into the pecuniary condition of the husband and the wife to ascertain whether he retained a sufficiency of means for his living, or whether this provision was necessary or proper for her support? Are they not competent to decide these questions? As between other parties, the court would take upon itself no such duties. Without going into an examination, or a re-examination, of the authorities on this subject, we refer to the case of *Sims v. Rickets*, 35 Ind. 181, and, upon the authority of that case and the cases there cited, hold that, upon the facts shown by the complaint, the deed in this case was valid, and the demurrer, so far as this point is concerned, properly overruled.

The next question is, had the common pleas jurisdiction of the subject-matter of the action? It is conceded by counsel for the appellant that the common pleas may try and determine the title to real estate when it comes in question incidentally in a suit in that court for partition of real estate. But it is claimed that in this case it is apparent that the primary and main object of the action is to try such title. We can not sustain this position. We are unable to see why the title to the real estate was any more directly involved in this than it is in other actions for partition. This question is hardly an open one in this court. *Wolcott v. Wigton*, 7 Ind. 44; *Fleming v. Potter*, 14 Ind. 486. There was no error in overruling the demurrer to the complaint.

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The next question relates to the right to open and close. The defendant claimed it. The court awarded it to the plaintiffs. We are of the opinion that the answer, although special, so far controverted the right of the plaintiffs to the land, and to have it partitioned, that it was not error to allow them the open and close. Although the execution of the deed was admitted, yet the ownership of the land and right of partition were denied. Without some evidence on the part of the plaintiffs, there could have been no judgment for them.

The next question grows out of the ruling of the court in refusing to allow Larkin Thompson to testify as a witness in his own favor on the trial of the cause. The part of the statute on which the question turns is as follows: "And provided further, that in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause." 3 Ind. Stat. 560, sec. 2.

We think the case comes within the spirit of this proviso, and that the appellant was properly excluded. The parties to the suit stood in the relation of heirs to Mrs. Thompson. The controversy related to the deed executed to her, and the suit was founded on it, within the spirit and meaning of the act. The suit was both by and against heirs, and the object of the action was to reach or affect the land which descended from the decedent. She being dead, the object of the act was to prevent the other party to the contract, or conveyance, from testifying concerning it. On this point, see *Malady v. McEnary*, 30 Ind. 273, and *Peacock v. Albin, ante*, p. 25.

The only other point relied upon is, that the evidence is insufficient to sustain the finding of the court. On the contrary, we think the evidence entirely satisfactory. The ex-

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press acknowledgment in the deed, and the other evidence, fully sustained the case, as made in the complaint.

The judgment is affirmed, with costs.*

F. M. Butler, for appellant.

T. Patterson, for appellees.

*Petition for a rehearing overruled.

ADKINS *v.* NICHOLSON.

JURISDICTION.—*Circuit Court—Court of Common Pleas.*—The circuit court has the power and jurisdiction to set aside and declare void, as fraudulent, a judgment recovered in the court of common pleas, upon the complaint of a creditor of the judgment defendant, such creditor not being a party to said judgment.

APPEAL from the Monroe Circuit Court.

PETTIT, J.—The only question in this case is, has the circuit court the power and jurisdiction to set aside and declare void, for fraud, a judgment of the common pleas court; at the instance and on the complaint of an injured creditor of the fraudulent judgment defendant, such creditor not having been a party to the fraudulent judgment? We answer the question in the affirmative. The case of *De Armond v. Adams*, 25 Ind. 455, is directly and conclusively in point with the case before us. Under the code, relief can be had against a fraudulent judgment, confessed for the purpose of defeating an honest creditor, in the same suit in which the judgment is sought for itself. *Harker v. Glidewell*, 23 Ind. 219; *Feaster v. Woodfill*, 23 Ind. 493. A stranger to a judgment may attack it in a collateral proceeding for fraud used in obtaining it. *Lee v. Back*, 30 Ind. 148.

We deem it unnecessary to cite further authorities, or make any additional remarks or reasoning of our own.

The judgment is affirmed, at the costs of the appellant.

BUSKIRK, C. J., having been engaged as counsel for Thomas

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Moore, who was a defendant below, but does not join in this appeal, declined to sit in the case.*

P. C. Dunning and J. W. Buskirk, for appellant.

N. Van Horn, R. W. Miers, J. S. Harvey, and F. J. Matlcr, for appellee.

*Petition for a rehearing overruled.

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136	505
39	538
147	495
34	538
142	463

APPEAL.—*Board of County Commissioners*.—A proceeding before a board of county commissioners to relocate a county seat is a special proceeding, for a special purpose, based upon a special statute which gives no right of appeal; and such proceeding, being special, cannot be governed by the general statute granting appeals (I G. & H. 253, sec. 31); and, therefore, no appeal lies from the decision of the board of county commissioners therein. *Harris v. The Board*, etc., 29 Ind. 170, and *Wright v. Harris*, 29 Ind. 438, criticised.

APPEAL from the Clay Circuit Court.

PETTIT, J.—This was a proceeding commenced before the board of commissioners of Clay county, to change, or relocate, the county seat. From the order of the commissioners, an appeal was taken to the circuit court, and in that court, on motion of appellees, the appeal was dismissed, because no appeal lies from the commissioners in this case. This dismissal alone is assigned for error.

The appellant had promised us a brief during last week, but it has not been furnished. We do not deem it necessary to write over again at length what has been repeated by this and other courts, upon analogous questions, clearly in point and principle with this. *Allen v. Hostetter*, 16 Ind. 15. In that case the court say: “The general statute, upon the subject of appeals, was enacted in view of usual and ordinary civil proceedings, and did not embrace proceedings under that special act.” *French v. Lighty*, 9 Ind.

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475; *Ex parte Smith*, 10 Wend. 449, and authorities there cited; *Trustees of the Town of Princeton v. Manck*, 35 Ind. 51, and authorities there cited.

We hold that from a proceeding before the county commissioners for the removal of a county seat, there is no appeal. That body has politico-judicial jurisdiction and power in their respective counties over this and similar questions, and we think the legislature wisely left to its final determination this question, instead of allowing an appeal to a court where either party would be entitled to a jury, and yet where a jury could not be made up of men who had not formed or expressed an opinion, and had not a real or supposed interest in the subject-matter of the suit.

The court committed no error in dismissing the appeal.

The judgment is affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

BUSKIRK, C. J.—A very earnest petition for a rehearing has been filed by the appellants, which has been supported by a very able argument. We have, upon this petition, re-examined and re-decided the principal question involved in the case, and which was decided upon the original hearing; and after this very careful and mature consideration, we are constrained to adhere to the original ruling.

We are referred, by the learned counsel for the appellants, to the cases of *Fordyce v. The Board, etc.*, 28 Ind. 454; *Hanna v. The Board, etc.*, 29 Ind. 170; and *Wright v. Harris*, 29 Ind. 438, as being in conflict with our previous ruling in this case. We do not consider the case of *Fordyce v. The Board, etc., supra*, as being an authority in point in this case. The ground upon which our ruling is based is, that this is a special proceeding, for a special purpose, based upon a special statute, which gives no right of appeal; and being a special proceeding, it cannot be governed by the general statute; and that, consequently, no right of appeal exists.

In the case first referred to, the board of commissioners

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had passed an order donating, out of the general fund, a large sum of money to aid in the construction of a railroad. The question in the case was, whether a tax-payer of the county, who felt himself aggrieved by such order, and who had shown his interest by affidavit, had the right to appeal from such order. It was decided by this court that an appeal would lie, and we think such ruling was correct. The board did not assume to act under any special statute, but under the general statute regulating and defining their powers and duties; and we are only surprised that any one should have ever doubted that section 31 of said act would apply to, and give a right of appeal in, such a case.

The counsel for the appellants, while relying upon the decision in the case of *Hanna v. The Board, etc., supra*, are forced to admit that that portion of the opinion which held that where the power to purchase a poor farm had been once exercised, the power was exhausted and could not again be exercised, was not the law. In the opinion of counsel thus expressed we very heartily concur.

But there is another principle announced in that case, which, in our opinion, was not then and is not now the law. It was held in that case that where a new power was conferred upon the board, a right of appeal would exist, unless in the act granting the power an appeal is denied.

An appeal is given by statute, and does not exist in any case unless it is expressly or by necessary implication conferred. The want of a denial of a power or right that does not exist cannot be construed to confer such right. The right of appeal is given by section 31 of said act from all decisions of the board, in the exercise of the powers conferred by such act. We are very clearly of the opinion that a special statute, conferring special powers for a special purpose, cannot become so incorporated into the general act prescribing the powers and duties of the board, that a right of appeal can exist under such general act.

The next and last case relied upon is that of *Wright v. Harris, supra*, which was an appeal by the remonstrants from

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the decision of the board granting a license to retail intoxicating liquors. The question in the case was whether an appeal would lie from such order. This court held that a right of appeal was expressly given by the statute of 1861. This ruling was clearly right. This disposed of the only point raised by the record; but this court proceeded to discuss the question of whether an appeal did not exist independent of the act of 1861, and having arrived at the conclusion that such right existed, proceeded to overrule the case of *Drapert v. The State*, 14 Ind. 123, which was or seemed to be in conflict with the conclusion arrived at. In our opinion, all that portion of said opinion which held that the act of 1861 was declaratory of a right which existed under the general statute was *obiter*.

It is claimed by the appellant that great injustice will result if a right of appeal does not exist; but that is a question for the legislature, and not for us.

The petition is overruled.

D. E. Williamson and A. Daggy, for appellants.

G. A. Knight, S. W. Curtis, I. M. Compton, and G. P. Stone, for appellees.

THE CINCINNATI, WABASH, AND MICHIGAN RAILROAD COMPANY ET AL. v. WELLS ET AL.

RAILROAD.—Appropriation to.—Petition.—Notice.—Injunction.—Under "an act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," 3 Ind. Stat. 389, the petition to the board of county commissioners, and the notice of election issued by the auditor, must specify the amount to be appropriated, and not a *per centum* upon the taxable property; and, where the petition does not specify the amount, but asks a certain *per centum* upon the taxable property of the county to be appropriated, the action of the board of commissioners, and the proceedings thereunder, to levy a tax, are void, and may be enjoined, at the suit of a tax-payer of the county; and an appeal from the action of the board is unnecessary.

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APPEAL from the Grant Circuit Court.

DOWNEY, J.—Complaint by appellees against the railroad company, the treasurer, and the board of commissioners of Grant county, to enjoin the collection of certain taxes levied for the purpose of raising money to be donated to the Grand Rapids, Wabash, and Cincinnati Railroad Company, which company, by consolidation with another company, afterward became the Cincinnati, Wabash, and Michigan Railroad Company. The complaint shows that the appellees are the owners of real and personal property in the county, subject to taxation, and consequently that they have such an interest as entitles them to sue.

The petition presented to the board of commissioners was as follows:

“To the honorable Board of Commissioners of Grant county, Indiana, at a called session, to be held on Saturday, October 2d, 1869.

“The undersigned voters and freeholders, residents of Grant county aforesaid, represent to your honorable body that the Grand Rapids, Wabash, and Cincinnati Railroad Company is a company duly organized under the laws of the State of Indiana; and your petitioners pray your honorable body to make an order for an election upon a day fixed therein of the voters of said county, to determine by such vote whether a tax shall be levied of one and three-quarters per centum upon all the taxable property of said county, to aid said railroad company in making and constructing a railroad through said county, and to donate to said railroad equal to the amount that can be raised therefrom to said company for that purpose, in accordance with the provisions of the act of the general assembly of the State of Indiana, approved May 12th, 1869, entitled ‘An act to authorize aid in the construction of railroads by counties and townships taking stock in and making donations to railway companies.’” Signed by more than one hundred persons.

On the said second day of October, 1869, on presentation of the petition, the board ordered it to be filed, and after in-

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spection of it, made and entered on their minutes this order:

"Ordered by the board, that there be held in each of the several townships in the county of Grant, and State of Indiana, an election, on the 8th day of November, 1869, for the purpose of determining whether there shall be donated by said commissioners, out of the county treasury, an amount equal to one and three-fourths per centum on each dollar valuation of real and personal property in said county, one-half of which amount to be levied at the June term, 1870, and the other half to be levied at the June term, 1871."

The following is the notice which was given of the election:

"RAILROAD ELECTION.

"Whereas, at a special session of the board of commissioners of Grant county, held on Saturday, the 2d day of October, 1869, a petition signed by sundry citizens of said county of Grant was presented, asking that the necessary steps be taken to levy a tax for the purpose of aiding in the construction of the Grand Rapids, Wabash, and Cincinnati Railroad;

"Now, therefore, notice is hereby given, that an election will be held, at the usual places of holding elections in the several townships in said county of Grant, on Monday, November 8th, 1869, in order that the qualified voters of the several townships may vote on the question of levying a tax, not exceeding one and three-fourths per centum upon the taxable property of said county of Grant, to aid in the construction of the Grand Rapids, Wabash, and Cincinnati Railroad, under the provisions of an act of the general assembly of the State of Indiana, approved May 12th, 1869.

"By order of the board of commissioners of Grant county.

"Attest:

WILLIAM NEAL,

"October 4th, 1869.

Auditor."

The notices posted up by the sheriff were in the same form.

On the 19th day of October, 1869, the board of commissioners made this further order:

"Ordered, by the board, that the tax heretofore levied, to

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wit, one and three-fourths per centum, to aid in the construction of the Grand Rapids, Wabash, and Cincinnati Railroad, be graduated as follows, to wit: In the townships of Van Buren, Monroe, Jefferson, Richland, Sims, and Green, one per cent. on the real and personal property; in the townships of Washington, Pleasant, Center, Marion, Franklin, Mill, Jonesboro, Fairmount, and Liberty, two per centum on the real and personal property; and if the said rates per centum be voted by the several townships at the election to be held on the 8th day of November, then the county shall take stock in said road to the amount equal to the sum raised by the rates as above."

This order was, by the authority of the commissioners, issued and largely circulated between the time it was made and the day of the election.

The election, according to the returns made, showed a majority for the railroad appropriation.

The commissioners attempted to carry out the order which they had made, fixing a different rate of taxation in different townships; but at the suit of one Tibbetts against the board of commissioners and others, in the circuit court, it was held that they could not do this, and they were directed to, and did, levy a tax according to the original intention, and it is this tax, the collection of which was enjoined in this action. Without setting forth more of the complaint and accompanying documents, we will proceed to the questions in the case, or some of them.

The first error assigned is the overruling of the demurrer to the complaint.

We are very clear that this ruling was correct. We will mention but two objections to the proceedings. The first is in the petition, and the second in the notice. The first section of the act, 3 Ind. Stat. 389, requires the amount to be appropriated to be specified in the petition. The petition in this case asked for a vote to determine whether a tax should be levied of one and three-quarters per centum upon the taxable property of the county, and that the amount to be

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donated should be equal to the amount that could be raised therefrom. It is useless to spend time in further demonstrating that this is not a specification of an amount to be appropriated.

Section 3 of the act relating to the notice of the election requires that the amount which it is proposed to appropriate shall be specified in the notice. In this case, as will be seen, the notice was that the amount for which the tax would be levied should not exceed one and three-fourths per centum upon the taxable property. The amount is not fixed at one and three-fourths per cent., even if that could have been held to be a compliance with the act. That rate of taxation was mentioned as the rate which should not be exceeded, but no certain rate of taxation, nor any amount of money to be appropriated, was mentioned or fixed. We have already held that a notice which did not specify the amount to be appropriated was invalid, and that the subsequent proceedings based on it were void. *Crooke v. The Commissioners of Daviess County*, 36 Ind. 320. If further authorities are considered necessary upon these points, we refer to *Mercer County v. The Pittsburgh and Erie Railroad Company*, 27 Pa. St. 389, and *The State v. Saline County Court*, 45 Mo. 242. There are other objections to these proceedings, about which we are not so well agreed.

The railroad company answered the complaint. The plaintiff demurred to the answer, and the demurrer was sustained, and this is the second error assigned. We have examined this answer and the accompanying documents, and are of the opinion that it does not state facts sufficient to constitute a defence to the action.

It is insisted by the appellants that as there might have been an appeal from the action of the board of commissioners, that remedy should have been resorted to, and that an injunction will not be granted. But an appeal could not be necessary to get rid of a void proceeding. If we are right in our opinion, that the petition was insufficient, the action of the board could not give it validity. The notice

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followed the order of the board, and defects in it could not have been reached by appealing from the order. Injunctive relief has been too long and too frequently applied in cases like this to justify any doubts as to the propriety of the remedy now. If it be conceded, as claimed by counsel for the appellant, that the record of the commissioners imports absolute verity, and that it must stand until reversed on appeal, we do not see how the application of this principle can benefit the appellant. Conceding that it means just what it says, and that what it asserts cannot be contradicted, still it fails to assert what is necessary to be shown in order to render the proceeding valid.

The judgment is affirmed, with costs.

J. Brownlee and H. Brownlee, for appellants.

J. Van Devanter, J. F. McDowell, A. Steele, R. T. St. John, and J. L. Custer, for appellees.

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CRIMINAL LAW.—*Indictment.*—*Disorderly House.*—An indictment for keeping a disorderly house must specify the acts of disorder, and unless it does so, should be quashed on motion.

APPEAL from the Hendricks Circuit Court.

BUSKIRK, C. J.—The appellant was jointly indicted with Patrick Leary for keeping a disorderly house. The court overruled a motion to quash the indictment, and this is assigned as the first error. The indictment, omitting the formal parts, was as follows:

“The grand jurors of Hendricks county, in the State of Indiana, good and lawful men, duly and legally impanelled, charged, and sworn to inquire into felonies and certain misdemeanors in and for the body of said county of Hendricks, in the name and by the authority of the State of Indiana,

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upon their oaths, present that Patrick C. Leary and James Leary, late of said county, on the 17th day of September, 1870, at said county and State aforesaid, did then and there keep a certain house in which intoxicating liquors were sold, bartered, given away, and suffered to be drank, and then and there kept said house in a disorderly manner, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

The objection urged to the indictment is, that it does not specify the acts of disorder. We think the objection is well taken. It was held by the Court of Appeals in the State of Kentucky, in *Frederick v. Commonwealth*, 4 B. Mon. 7, that "an indictment charging generally the keeping of a disorderly house, without specification as to the acts of disorder, would not be good. So if the acts specified are not proven, the indictment cannot be sustained upon the proof of other acts not specified. But if the acts specified or such of them as constitute the house a disorderly one be proven, then other acts, which do not amount to a distinct offence, and for which a distinct prosecution will not lie, may be proven under the general charge to increase the fine."

The above opinion is referred to with approval by Bishop, in his work on Criminal Procedure, together with many other decisions holding the same way. See 2 Bishop Crim. Proced. 232-241.

We think the court erred in overruling the motion to quash the indictment.

As there may be another indictment found, we deem it proper that we should pass upon the second error assigned, which is based upon the refusal of the court to grant a new trial.

We have examined the evidence, and are of the opinion that it entirely failed to make out a case against the appellant. It was shown upon the trial, that the appellant and Patrick C. Leary kept a house in the village of Brownsburgh,

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in which groceries and liquors were sold; that on the 20th day of September, 1870, there was a large meeting of Irish, engaged in the construction of a railroad, in the said town; that in the afternoon of said day, a riot and general fight took place in the alley near to, and in the stable in the rear of, said business house; but there was no evidence that the Irish had purchased any liquor from the Learys that day, or that they had drank any in their house. It was, however, proved that there were two drug stores in said town, which sold liquors, and that they, on that day, sold liquor to the persons engaged in said riot. It was proved, on the part of the defence, that the Learys on that day refused to sell, and did not sell, any liquors. It was proved that the persons engaged in the riot and disorderly conduct purchased liquor, in jugs and bottles, at the drug stores, and carried it into the alley and rear part of the premises of the Learys, and there drank it. There was no evidence of any disorderly conduct at any other time than on the day named in the indictment. The same thing might have occurred near a dry goods store or private residence in said town, for there was no force there that could have controlled the rioters. It was one of those unfortunate and greatly to be regretted riots that occasionally occur on the line of our public works, for which no one person, not engaged in it, should be held responsible.

The judgment is reversed; and the cause is remanded, with directions to the court below to quash the indictment.

C. C. Nave and C. A. Nave, for appellant.

B. W. Hanna, Attorney General, for the State.

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to be governed by the law in regard to circuit courts, and the 77th section of the criminal code, as amended on the same day (3 Ind. Stat. 548), providing that, on an application for change of venue, where the objection is to the judge of the circuit court, any other circuit judge may hold the court and try the cause, must be construed together, and the judge of the criminal circuit court be considered a circuit judge within the intent and meaning of said section as amended.

APPEAL from the Clarke Common Pleas.

WORDEN; J.—James M. Wiley was indicted in the circuit court of Decatur county for the crime of murder. He filed an affidavit that he could not have a fair and impartial trial before the judge of that court, the Hon. Jeremiah M. Wilson, and thereupon the judge called to preside at the trial of the cause the Hon. George H. Chapman, the judge of the Marion Criminal Court. Wiley objected to the competency of Judge Chapman to preside at said trial, but his objection was not sustained. He was tried before the latter judge by a jury, convicted, and sentenced to imprisonment in the penitentiary for life. He applied for a writ of habeas corpus, and claimed to be discharged from imprisonment in the penitentiary, on the ground that Judge Chapman, being the judge of the Marion Criminal Court, and not the judge of a circuit court or court of common pleas, was incompetent to try said cause, and had no jurisdiction in the premises; and, therefore, that the judgment of condemnation was a nullity, and did not authorize the warden of the State's prison to detain him. The writ was issued, and upon a hearing of the cause in the court below, Wiley was remanded to custody. From that order he appeals to this court.

The only question presented is, whether Judge Chapman was authorized to preside at the trial of the cause in the Decatur Circuit Court. The solution of this question must depend upon the construction of statutory provisions, which will be noticed.

On the 20th of December, 1865, an act was approved, making Marion county the sixteenth judicial circuit, and establishing therein the court styled "a criminal circuit

Ex Parte Wiley.

court," and providing, amongst other things, that the "said court shall, in all things not otherwise provided by law, be governed by the law now in force in regard to circuit courts." The court thus established was invested with "complete jurisdiction" in criminal actions. Subsequently, other acts were passed by the legislature, of the same general character, creating judicial circuits in other counties, and establishing therein criminal circuit courts. 3 Ind. Stat. 172.

On the same day, December 20th, 1865, the 77th section of the criminal code, on the subject of the change of venue in criminal cases, was amended. The amended section is as follows: "When the objection is to the judge, in an action pending in the court of common pleas, the action may be transferred to the circuit court of the county, and tried therein. When the objection is to the judge of the circuit court, any other circuit judge, or judge of the common pleas, may hold the court and try the cause." 3 Ind. Stat. 548.

Now it is claimed that the judges of the criminal courts thus established are not circuit judges, and therefore cannot be called to preside, where objections, in criminal cases, are made to circuit judges. But we are of opinion that they are circuit judges within the meaning of the statute above quoted, on the subject of the change of venue. We agree, as was decided in *Clem v. The State*, 33 Ind. 418, that the criminal courts thus established are not circuit courts within the 7th article of the constitution; that they are inferior courts in the same sense in which the common pleas is an inferior court. But whilst they are not such circuit courts as are contemplated by the constitution, they are such courts as the legislature had the right to establish. The legislature had the right to give them whatever name it saw proper, and they were called criminal circuit courts. The territory over which jurisdiction was extended was denominated a circuit. We have seen that the act establishing the criminal circuit court in Marion county, and that amending the act in respect to change of venue, were passed at the same ses-

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sion of the legislature and approved on the same day. They must be construed together. The court thus established being called a criminal circuit court, and its jurisdictional limits as to territory denominated a circuit, we think the judge of the court was a circuit judge within the intent and meaning of the amendment of the act as to change of venue. That amended act provided for calling "any other circuit judge." While the judge of the criminal court was not the judge of a circuit court within the meaning of the constitution, we think he was a circuit judge within the meaning and intent of the legislature. This construction, it is believed, will better subserve the public convenience, and carry out the true intent of the legislature, than to hold that the judges of the several criminal courts could not be called in such cases.

We therefore conclude that Judge Chapman was rightfully called, and had full authority to preside at the trial of said cause.

The judgment below is affirmed, with costs.

F. Gavin, F. D. Miller, W. O. Foley, C. Ewing, and J. K. Ewing, for appellant.

B. W. Hanna, Attorney General, for the State.

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PRACTICE.—*Appraisement.—Verdict.—Judgment.*—Where, to a complaint upon several different causes of action, part of which are collectible with, and part without, relief from valuation or appraisement laws, there are answers of payment and set-off, and, upon the trial of the issues, there is evidence given supporting the answers, and only a general verdict is returned in favor of plaintiff for a sum in gross, a judgment rendered upon the verdict for part of the sum so found with relief from appraisement laws, and part without such relief, is erroneous.

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136	104

APPEAL from the Clay Common Pleas.

DOWNEY, J.—Suit by the appellee against the appellants, issues, trial by jury, verdict for the plaintiff, motion for a

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new trial made and overruled, and judgment on the verdict. Two errors are assigned; first, the refusal to grant a new trial on the motion of the appellants; and, second, the making of an order for the collection of a part of the amount of the verdict without relief from valuation laws.

The new trial was asked for the following reasons: first, that the damages found by the jury were excessive; second, error in the assessment of the amount of recovery, the same being too large; third, that the verdict of the jury was not sustained by sufficient evidence; fourth, that the verdict was contrary to law; and, fifth, newly-discovered evidence.

The first paragraph of the complaint was predicated on a mortgage given to secure the payment of a certain promissory note, and sought a foreclosure of the same and a sale of the mortgaged premises. The second paragraph was for personal property sold, for the amount of a certain promissory note, for work and labor and materials furnished, and for cash loaned, a bill-of particulars of which was filed.

The defendant Brown made default. Jarboe pleaded the general denial, payment, and a set-off, consisting of a great many items due to the defendants. There was a reply to the second and third paragraphs of the answer of Jarboe, traversing the same.

The ground relied upon by counsel for the appellants in argument is that the evidence was not sufficient to justify the verdict of the jury.

All the parties to the controversy and other witnesses were sworn, each giving his version of the matters in dispute. A part of the items of the set-off was admitted by the plaintiff to be correct. We are unable to discover any reason for interfering with the judgment on account of the alleged insufficiency of the evidence.

The other question is one of more difficulty. The verdict was for thirteen hundred dollars, without showing how much of it was due on the mortgage and notes, or how much on the account. On this verdict the court, over the objection of the defendants, rendered a judgment for eleven hundred

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and sixty-four dollars, the amount said to be due on the mortgage, collectible without relief from valuation laws, and another judgment for ninety-five dollars and seventy cents, collectible in the same way, and still another for forty dollars and thirty cents, the residue of the verdict and costs, collectible generally. The note secured by mortgage, and also the small note mentioned in the second paragraph of the complaint, were collectible without relief from valuation laws.

It is provided by the code, that "when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment. When a plaintiff has included in one action demands subject to the appraisement laws, with demands made payable without any relief from appraisement laws, the court may render separate judgments upon such demands." 2 G. & H. 220, sec. 381. There is no difficulty in following this statute when the amounts for which the different judgments are to be rendered are ascertained by the finding of the court, by the verdict of a jury, or in any other legitimate way. But in this case there was no such data upon which to render the separate judgments. It was merely a matter of guess with the court as to what amount should be said to be due on the mortgage note, the other note, or on the account. If the doctrine relating to the appropriation of payments be supposed to have any bearing on the question, it must be remembered that here there was a set-off as well as a payment pleaded, and also that that doctrine, though it might, in a proper case, be applied at the trial of the cause, can have no application at this stage of the case.

The judgment as rendered cannot be sustained, and it is therefore reversed, with costs, and the cause remanded.

ON PETITION FOR A REHEARING.

DOWNEY, J.—A petition is filed in this case in which a rehearing is asked, on the grounds,

First. The judgment of the court is supposed to be

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erroneous in reversing the judgment of the court below on account of the form thereof.

Second. In granting a new trial to the appellants on account of the form of the judgment below.

Third. In ordering the cause to the court below without special instructions as to the form of the judgment to be rendered therein.

We are still of the opinion that the judgment was properly reversed. We did not order a new trial to be granted, nor did we decide that the verdict should be set aside. The only error that we found was in rendering the judgments, and to that extent only does the reversal extend. If counsel for the plaintiff had required a finding as to the amount due on the notes and on the account separately, it would have been easy to render the proper judgments. This they did not do. Having found no reason for setting aside the verdict, but having only reversed the judgment, we supposed it would be understood that a judgment in the ordinary form was to be rendered on the verdict, and hence no more definite instructions were deemed necessary. We foresee, however, that this course may not be convenient, or, perhaps, the mortgaged premises could not be sold at all on such a judgment. 2 G. & H. 297, sec. 640. We have, as a means of extricating the appellee from the entanglement, concluded to instruct the court to render one judgment, not waiving the benefit of valuation laws, for the whole amount of the verdict, or if the plaintiff prefer, to grant a new trial on the motion of the defendants.

The petition for a rehearing is overruled, and the court is instructed to proceed as in this opinion indicated.

G. A. Knight, G. P. Stone, and E. Miles, for appellants.

W. Curtis, I. M. Compton, W. W. Carter, and S. D. Coffee,
for appellee.

Anderson v. The State.

ANDERSON v. THE STATE.

EVIDENCE.—*Criminal Law.*—*Reasonable Doubt.*—*Selling Intoxicating Liquor to Minor.*—Where, on the trial of an indictment for selling intoxicating liquor to a minor, the evidence showed that the person who sold the liquor was, at the time of the sale, behind the counter of the saloon of the defendant, acting as bar-keeper, but did not also show that such person was the agent of the defendant, or was employed by him, or that the defendant had any knowledge of the sale;

Held, that the evidence was insufficient to show the guilt of defendant beyond a reasonable doubt.

APPEAL from the Parke Circuit Court.

PETTIT, J.—This was an indictment for selling liquor to a minor. Plea of not guilty, trial by the court, finding of guilty, motion for a new trial overruled, exception, and judgment on the finding. The motion for a new trial was for this cause: first, "the finding of the court is not sustained or warranted by the evidence in the cause." This was all the evidence in the cause: John Stryker, the person to whom the liquor was alleged to have been sold, testified:

"At another time different from the 24th day of December, 1870, and within two years previous to the finding of this indictment, I bought a drink of liquor at Anderson's saloon, one door west of the tavern; I do not know who the person was that let me have the whiskey; I am acquainted with defendant, Anderson, also with Snyder and Joiner; it was not either Joiner or Snyder who sold me the whiskey; Anderson may have been present; I did not see him; I suppose Anderson was some place about the house; the person who let me have the liquor was a heavy-set man; it was not the defendant, Anderson; the liquor was bought by me in Rockville, Parke county, Indiana; and I am under twenty-one years of age."

Cummings, sheriff, and Gregg, deputy auditor of the county, testified that the place where the liquor was bought was the place Anderson obtained license to sell in, and that the defendant is the person who got license, and the saloon was carried on in defendant's name, and by him.

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Stryker recalled: "The person of whom I bought the liquor was behind the counter, acting as the bar-keeper; I do not know whether he put the money paid into his pocket or into the drawer."

It was admitted by the State and the defendant that the defendant, at the time the liquor was sold, had license to retail. Stryker stated that he laid the money on the counter, but does not know whether the bar-tender put the money in his pocket or in the drawer. He was acting as bar-tender. "I was in the habit of buying liquor at defendant's house; can't say how many times."

We think there is no evidence in this case to warrant or justify the finding and judgment in it, and on the authority of *Hipp v. The State*, 5 Blackf. 149, and *Lauer v. The State*, 24 Ind. 131, the judgment must be reversed.

The evidence does not show that the person who sold the liquor was the agent of Anderson, or employed by him, or that Anderson had any knowledge of the sale.

This is not a civil case, where the mere preponderance of the evidence is to govern, but a criminal case, or a misdemeanor, in which the evidence must show guilt beyond a reasonable doubt. In this case, the evidence is such not only as would create a doubt of guilt, but it nearly conclusively shows that the defendant was not guilty.

The judgment is reversed, and cause remanded for further proceedings.

S. F. Maxwell, S. D. Puett, J. E. McDonald, J. M. Butler,
and *E. M. McDonald*, for appellant.

B. W. Hanna, Attorney General, for the State.

ANDERSON *v.* THE STATE.

APPEAL from the Parke Circuit Court.

PETTIT, J.—This case is the same, in all legal aspects, as

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the case of *Anderson v. The State*, *ante*, p. 553; and on the authority of that, and for the reasons therein given, the judgment in this is reversed, and cause remanded for further proceedings.

S. F. Maxwell, S. D. Puett, J. E. McDonald, J. M. Butler, and *E. M. McDonald*, for appellant.

B. W. Hanna, Attorney General, for the State.

ANDERSON *v.* THE STATE.

APPEAL from the Parke Circuit Court.

PETTIT, J.—This case is the same, in all legal aspects, as the case of *Anderson v. The State*, *ante*, p. 553; and on the authority of that, and for the same reasons, this case is reversed, and remanded for further proceedings.

S. F. Maxwell, S. D. Puett, J. E. McDonald, J. M. Butler, and *E. M. McDonald*, for appellant.

B. W. Hanna, Attorney General, for the State.

RANDLES *v.* RANDLES.

PLEADING.—*Complaint*.—A complaint which, purporting to be upon a promissory note, alleges a promise by defendant, on a day in blank, to pay blank dollars and blank cents, and with which no note or copy thereof is filed, is insufficient.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—The only question made in this case is as to the sufficiency of the complaint. It is as follows:

“The State of Indiana, Tippecanoe County, ss. In the Common Pleas Court. To the November term, 1869.

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"Peter Randles, plaintiff, complains of Benjamin Randles, defendant, and says that the defendant, on the — day of —, by his note, a copy of which is filed herewith, promised to pay Peter Randles — dollars and — cents, which remains unpaid; and the plaintiff claims judgment for five hundred dollars. Other relief.

"W. C. WILSON, Attorney for Plaintiff."

Neither the note nor a copy of it was filed with the complaint.

We think the complaint was insufficient.

The judgment is reversed, with costs, and the cause remanded.

W. D. Lee and P. H. Lee, for appellant.

W. C. Wilson, for appellee.

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TRAYSER ET AL. v. THE TRUSTEES OF INDIANA ASBURY UNIVERSITY ET AL.

MORTGAGE.—*Foreclosure of.*—*Practice.*—Where a mortgagee, whose debt, secured by the mortgage, is not due, is made a defendant in a suit to foreclose a subsequent mortgage, securing a debt which is due, and files a cross complaint setting up such prior mortgage, and asking its foreclosure, the court may decree the foreclosure of the subsequent mortgage, and order a sale of the property mortgaged, subject to the lien of the prior mortgage, but cannot foreclose the prior mortgage or order a sale to satisfy it.

SAME.—It is error to sustain a motion to strike out an answer to said cross complaint alleging that the debt secured by such prior mortgage is not due.

PAYMENT.—*Extension of Time of.*—*Consideration.*—The giving of additional security by a person, not a party to a promissory note, is a valuable consideration for an agreement by the payee to extend the time of payment of such note.

SAME.—*Pleading.*—*An agreement by the payee to extend the time of payment of a note secured by mortgage, in consideration of the execution to him, by a person not a party to such note and mortgage of a mortgage, as additional*

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security for the payment of said note, is a good answer to an action commenced by said payee before the expiration of such extension, for the foreclosure of both mortgages.

SUPREME COURT.—*Constitutional Law.*—Unless waived by a party, the Supreme Court is required to give a statement in writing of each question arising in the record of a case, and the decision of the court thereon, as provided in section 5, article 7, of the constitution of the State (1 G. & H. 46). A question arises in the record when it is fully and clearly stated in the transcript, and is embraced in an assignment of error, and the decision thereof is necessary to the final determination of the cause.

ASSIGNMENT OF ERROR.—*Waiver of.*—An assignment of error may be waived by an entry on the record, or by express waiver in a brief or oral argument, or by a concession incompatible with the error assigned; but the mere failure of counsel to argue a question “arising in the record” cannot be regarded as a waiver of the error.

APPEAL from the Marion Circuit Court.

BUSKIRK, C. J.—This was an action by the trustees of Indiana Asbury University against George Trayser, William J. H. Robinson, Joshua W. M. Langsdale, Cornelius L. Irving, Alexander B. Irving, David Macy, Isaiah Mansur, Maria Cunningham, The Indianapolis Piano Manufacturing Company, The First National Bank of Indianapolis, George F. Adams, Christian E. Geisendorff, Sarah H. Geisendorff, Jacob C. Geisendorff, Isaac Thallman, Ann M. Robinson, and Frank Ingersoll, to obtain judgments on certain notes, to foreclose two mortgages, to have them decreed to be prior liens to a mortgage held by David Macy and other mortgages and judgments held by others of the defendants.

The complaint was in two paragraphs. It was alleged in the first paragraph that the defendant David Macy was the treasurer and financial agent of the plaintiff; that William J. H. Robinson, Joshua W. M. Langsdale, George Trayser, Cornelius L. Irving, and Alexander B. Irving, partners under the firm name of Trayser, Robinson & Co., on the 30th day of March, 1867, executed a mortgage, conveying to the plaintiff the tract of land therein described, as surety for the payment of a debt for the sum of fifteen hundred dollars, evidenced by note of even date with the mortgage, payable on the 1st day of January, 1870, with ten per cent. interest

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and waiving relief; that said note was given for part of the purchase-money for the real estate mortgaged, purchased by them of their co-defendant David Macy; that the said David Macy being at such time the treasurer of the plaintiff, without the knowledge or consent of plaintiff, made the said mortgage second to a mortgage executed by said defendants to the said Macy; that said act of said Macy was in violation of his duties as such treasurer; that by reason of such breach of trust, the mortgage of the plaintiff should have priority over the mortgage of the said Macy; that said David Macy, Isaiah Mansur, Maria Cunningham, The Indianapolis Piano Manufacturing Company, Christian E. Geisendorff, Sarah H. Geisendorff, Jacob C. Geisendorff, Isaac Thallman, The First National Bank of Indianapolis, George F. Adams, Ann M. Robinson, and Frank R. Ingersoll claim to have some interest in the real estate mortgaged.

It was alleged in the second paragraph of the complaint, that the Indianapolis Piano Manufacturing Company, on the 26th day of October, 1868, executed a mortgage conveying to the plaintiff the real estate and personal property therein described, to secure the payment of the note mentioned in the first paragraph of the complaint, and another note executed by said defendant to the plaintiff, on the 23d day of October, 1868, due thirty days after date, for two hundred and sixty-eight dollars and sixty-six cents, which has been paid; that the said Indianapolis Piano Manufacturing Company, in said mortgage, agreed to pay the note described in the first paragraph of the plaintiffs' complaint, without relief from the valuation or appraisement laws, and with interest, payable in advance, on the first days of January and July of each and every year; that said Isaiah Mansur, Maria Cunningham, The Indianapolis Piano Manufacturing Company, The First National Bank of Indianapolis, George F. Adams, Christian E. Geisendorff, Sarah H. Geisendorff, Jacob C. Geisendorff, Isaac Thallman, Ann M. Robinson, and Frank R. Ingersoll claim to have some interest in the property

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mortgaged; that the note for fifteen hundred dollars is due and unpaid.

The prayer of the complaint was for judgment on the note, foreclosure of the mortgages, sale of the mortgaged property, and that said mortgages should have priority over the mortgages and judgments held by the defendants, other than those who had executed the said note and mortgages. Copies of the notes and mortgages were filed with and constituted a part of the complaint.

The defendant David Macy answered the allegations of the complaint by the general denial. He also filed a cross complaint, in which the plaintiff and all his co-defendants were made defendants.

The material allegations in the cross complaint were, that William J. H. Robinson, George Trayser, Joshua W. M. Langsdale, Cornelius L. Irving, and Alexander B. Irving, partners by the style of Trayser, Robinson & Co., on the 30th of March, 1867, executed their note, payable to him, in the sum of two thousand dollars, on or before the 30th of March, 1872; that to secure the payment of the said note, the makers thereof, by their proper names, on the said day, executed to him, the said Macy, a mortgage on the real estate described in the first mortgage given to the plaintiff; that the said mortgage is prior in date to the mortgage of plaintiff and the encumbrances held by his co-defendants; that he expressly and positively denied that he acted in bad faith toward the plaintiff, in taking the first lien on said property, but, on the contrary, he acted in perfect good faith, and took ample security for the payment of the note of the plaintiff; that the said Trayser, Robinson & Co., at the date of the note due the plaintiff, and when the same became due, were entirely solvent; that the note of the plaintiff was made payable in one year, while the note was made payable to himself in five years; that he surrendered to the plaintiff the note sued on, on the 12th of July, 1867, long before it became due; that notwithstanding the facts heretofore stated, the plaintiff, by an agreement with the makers

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thereof, and for a valuable consideration, agreed to, and did, extend the time of payment therefor from the maturity thereof until the commencement of this action, to wit, until the 9th day of February, 1870; that the said plaintiff, as additional security for her note, has taken another mortgage, while he has no security for his note except said mortgage and personal liability of the makers of his note; that the real estate described in his mortgage and the first mortgage to the plaintiff is not susceptible of partition. Prayer, that the plaintiff shall be compelled to sell the property described in the second mortgage to the plaintiff before selling the property described in the first mortgage to plaintiff and in the mortgage to him; that his mortgage may be foreclosed and be decreed to be a prior lien on said property; and for all other proper relief.

Inasmuch as Trayser, Robinson & Co. are the only parties who have appealed or assigned errors, it will not be necessary to notice the pleadings filed by the other defendants, further than to say that proper issues were formed between such defendants and the plaintiff and David Macy upon his cross complaint.

The defendants Trayser, Robinson & Co. demurred to the cross complaint. The demurrer was overruled, and they excepted. They then filed an answer in two paragraphs to the cross complaint. Upon the motion of Macy, the second paragraph of such answer was stricken out, to which ruling a proper exception was taken.

The defendants Trayser, Robinson & Co. answered the original complaint in two paragraphs. The plaintiff demurred to the first paragraph of such answer. The demurrer was sustained, and an exception taken.

The cause was by the agreement of the parties submitted to the court for trial. The court rendered a long special finding, which we do not deem it necessary to copy in full, as a brief summary of the finding will answer our purpose.

The court found that the mortgage of Macy constituted a prior lien to the mortgages of the plaintiff and the judgments

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of the other defendants; that the property mortgaged was susceptible of division; and decreed the foreclosure of the mortgage of Macy, and that a certain portion of the mortgaged property should be sold to satisfy said debt so found due to said Macy.

The court found the amount due to the plaintiff and decreed a foreclosure of both mortgages, and directed what property should be sold under such decree.

The appellants moved the court for a new trial in the original action and on the cross complaint, which motion was overruled, and an exception taken. The evidence is not in the record, and, consequently, no question can arise as to the sufficiency of the evidence to sustain the finding of the court.

The only available errors are, that the court erred in sustaining the motion of David Macy to strike out the second paragraph of the appellants' answer to the cross complaint, and in sustaining the demurrer of the original plaintiff to the first paragraph of the answer of the appellants to the original complaint.

The second paragraph of the answer of the appellants to the cross complaint was as follows:

"2. And said defendants, for a further answer to said David Macy's cross complaint, say that his said note therein mentioned and described is not due and collectible until March 30th, 1872. Wherefore they say he cannot have and recover thereon as in said cross complaint prayed, and that he is not now entitled to the relief therein demanded. Wherefore they pray judgment.

HANNA & KNEFLER,

"Attorneys for Defendants."

The above answer was sworn to.

Did the court err in striking out said answer. The learned counsel for Macy have not attempted to sustain by argument or authority this ruling of the court, but they have suggested, in their brief, that the error should be regarded as waived by the failure of the counsel for appellants, in their

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brief, to insist upon such error. This ruling of the court has been assigned for error in this court, and the error has not been waived on the record or in the brief of counsel, nor is it insisted on in argument.

The question is presented whether the failure of counsel to argue and insist upon an error assigned can be regarded as a waiver or abandonment of such error. Section 5 of article 7 of our State constitution provides, that "the Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the court thereon." I G. & H. 46.

This court was required, in several cases, soon after the adoption of our present constitution, to place a construction upon the above section of the constitution. See *Henry v. The State Bank of Indiana*, 3 Ind. 216; *Hand v. Taylor*, 4 Ind. 409; *Rice v. The State*, 7 Ind. 332; *Ferguson v. Harrison*, 7 Ind. 610; *Clark v. Trovinger*, 8 Ind. 334; *Boggs v. The State*, 8 Ind. 463.

In *Willets v. Ridgway*, 9 Ind. 367, in a well-considered case, this court placed a construction upon the section in question, which has been approved, adhered to, and followed in all subsequent cases, down to the present time. The court say:

"Other questions have been presented upon which we shall now intimate no opinion. It is true that the constitution, by an unwise provision, requires that this court shall give a written opinion upon every point arising in the record of every case; a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled, as well as frivolous, points and often to introduce into them, in the great press of business, premature and not well-considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good English. But though the provision is not to be disregarded, it is to be observed according to some construction, and should receive

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such a one as to obviate its inconvenience and objectionable character, as far as consistently can be done.

"It often happens that a point is raised involving an important principle, but of minor consequence in its bearing upon the particular case, while it presents the material question in some other pending cause. Now, to decide it in the case where, from its subordinate position, it is but carelessly argued, by one side or the other, if at all, and hence, perhaps, but hastily considered by the court, is unjust to counsel whose subsequently pending cause is thus prejudged, without their being heard, and upon an argument on which they would be unwilling to rest it. It is this class of decisions which forms the bane of judicial reports.

"These, and other considerations, have lead the court to inquire—When does a question, in the sense of the constitution, arise in the record?

"We do not think it does so merely because it is raised by counsel, nor because it is presented in the assignment of errors. Nor, necessarily, because it is raised in a bill of exceptions. It must be a question, the decision of which is necessary to the final determination of the cause; and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings. Hence, it has been the frequent practice of the court, in cases where a single point would put an end to a case, to decide that point and no other.

"So, where a cause was necessarily reversed for one or more errors, and remanded for a new trial, which might be upon new issues, formed by amended pleadings, and with more or less evidence, points which were made upon the first trial, but might not arise upon the record, or were not so distinctly and satisfactorily presented by the record as they might be after another trial, have been considered as not necessarily and properly arising in the record, and have been passed."

From the foregoing opinion, it is quite manifest that at least three things must concur, before a question, within the

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meaning of the constitution, arises in the record; first, the question must be fully and clearly stated in the transcript; second, there must be an assignment of error covering the point; third, it must be a question, the decision of which is necessary to the final determination of the cause.

Does the question under consideration properly arise in the record? Macy, in his cross complaint, demanded a foreclosure of his mortgage and a sale of the mortgaged property. The appellants answered, by alleging that the debt secured by the mortgage was not due. Upon the motion of Macy, the answer of appellant was stricken out, and the question was reserved by a bill of exceptions. The appellants have assigned this ruling of the court for error.

The decision of this question is necessary to the final determination of the controversy between Macy and the appellants, and is the only error assigned as to Macy. In our opinion the question, properly and legitimately, within the meaning of the constitution, arises in the record, and must be decided by us, unless there has been a waiver of the error assigned. Has there been such a waiver?

An assignment of error stands as a complaint. An error may be waived by an entry upon the record, or, by leave of the court, it might be amended or stricken out. An assignment of error may be expressly waived in a brief, or in oral argument, or it might be waived by an admission or concession incompatible with the error assigned.

The law does not require parties to either brief or argue orally causes in this court. We have attempted to supply the omission by adopting a rule dismissing the appeal where no brief is filed as therein required. There was at one time a rule of this court, that questions that were not argued would be regarded as waived; but no such rule now exists.

We are very clearly of the opinion that a mere failure to argue a question, that has been assigned for error, cannot be regarded as a waiver or abandonment of the error assigned.

Did the court err in striking out the answer of appellants to cross complaint of Macy? The ruling of the court is

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wholly indefensible. The debt of Macy was not due, and in such a case there could be no foreclosure or sale of the property. The court might have decreed that the mortgage of Macy constituted a prior lien, and should have decreed that the property should be sold subject to his mortgage and prior lien.

The next question presented for our decision is, whether the court erred in sustaining the demurrer to the first paragraph of the answer of appellants to the original complaint. The paragraph in question reads as follows:

"Come now the defendants, William J. H. Robinson, George Trayser, Joshua W. M. Langsdale, Cornelius L. Irving, Alexander B. Irving, The Indianapolis Piano Manufacturing Company, Ann M. Robinson, and Frank Ingersoll, and for answer to the plaintiff's complaint, say it is true, as in said first paragraph of complaint alleged, that said defendants, William J. H. Robinson, Joshua W. M. Langsdale, George Trayser, Cornelius L. Irving, and Alexander B. Irving, under their then firm name of Trayser, Robinson & Co., executed said note sued on, and on the same day said note was executed, they executed said mortgage on the east half of the north two-thirds of lot number six (6), in square number sixty-two (62), in the city of Indianapolis, a copy of which mortgage is filed with said first paragraph of plaintiff's complaint; and they say that all interest on said note has been paid up to January 1st, 1870; and said defendants further say that after the execution of said note and mortgage, to wit, on the 26th day of October, 1868, said defendant, The Indianapolis Piano Manufacturing Company, executed and delivered to the plaintiff a certain additional mortgage, the better to secure the payment of said note, a copy of which is filed with the second paragraph of plaintiff's complaint, and said second mortgage was executed in consideration of the plaintiff's agreeing to and with the defendants to extend the time of the principal of said note sued on until the first day of January, 1872; and said second mortgage was by the plaintiff accepted in faith of said con-

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tract and agreement; and the defendants aver and charge it to be true that at the time of the execution of said last mentioned mortgage, it was expressly understood and agreed between the plaintiff and the defendants that the date when the principal of said note should become due and payable should be extended until the first day of January, 1872, the interest thereon to be paid in advance on the 1st of January and July of each year, and that the time of payment of said note should be extended until the said 1st day of January, 1872, and that the same should not be due and collectible until said date; and that in consideration of said agreement to extend the time of payment of said note, and in consideration of said extension in fact made, the said defendant, The Indianapolis Piano Manufacturing Company, agreed to and did execute and deliver to said plaintiff said additional mortgage, which was by her executed in performance of said agreement on the part of the defendants, whereby they were to give additional security and have secured to them the extension as aforesaid; and said mortgage was executed upon said consideration, and for the purpose as aforesaid, and not otherwise, and was received and accepted by the plaintiff in faith and in pursuance thereof; and the defendants say that on the 1st of January, 1870, they tendered to the plaintiff the interest on said note for the ensuing half year, and have at all times, and still are ready and willing to keep and perform their said agreement to pay the interest thereon semi-annually; and they now bring into court the interest on said note for the half year, from January 1st, 1870, as heretofore tendered, and now again tender the same; and they aver that they have, and in all things intend in good faith to keep and perform their part of said agreement. Said defendants say that by reason of the premises said note is not due and collectible until the 1st of January, 1872, and that said plaintiff cannot and ought not to have and maintain her said action on said note; that her said action has been prematurely brought, and that the bringing of the same is in violation of

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her agreement and contract aforesaid; wherefore, defendants pray judgment."

The material facts presented by the answer are these: Trayser, Robinson & Co. executed their note to the plaintiff for fifteen hundred dollars, payable in one year from date, and, to secure the payment of such note, the first mortgage sued on was executed. After the note became due, the parties met together, when it was agreed that in consideration that the makers of the note should give the second mortgage sued on, and that they would pay the interest on the first days of January and July of each year in advance, and that the Indianapolis Piano Manufacturing Company should guarantee the payment of the note and the interest semi-annually, the time for the payment of the principal of the note should be extended until the first day of January, 1872. It was alleged that the appellants had fully complied with all the terms and conditions of said contract, and that the plaintiff had commenced this action in violation of such agreement.

We think that the facts stated in the answer showed that there was a valid agreement to extend the time of payment of the note, and that this action was brought in violation of such agreement. This is a chancery suit, and it is well settled that courts of chancery will not enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time. To do so would be against conscience and good faith, and in fraud of the rights of the appellants.

The case of *Loomis v. Donovan*, 17 Ind. 198, is much in point, and is decisive of the question. There are many other decisions to the same effect. See *Harbert v. Dumont*, 3 Ind. 346; *Dickerson v. The Board, etc.*, 6 Ind. 128; *Redman v. Deputy*, 26 Ind. 338; *Fellows v. Prentiss*, 3 Denio, 512; *Bailey v. Adams*, 10 N. H. 162; *Fowler v. Brooks*, 13 N. H. 240; *McComb v. Kittridge*, 14 Ohio, 348; *Austin v. Dorwin*, 21 Vt. 38; *Creath's Adm'r v. Sims*, 5 How. U. S. 192;

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Riley, Administratrix.

Calvin v. Wiggam, 27 Ind. 489; *Charlton v. Tandy*, 28 Ind. 452.

The court erred in sustaining the demurrer to the answer.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the motion to strike out the answer of the appellants to the cross complaint, and to overrule the demurrer to the answer of appellants to the original complaint, and for further proceedings in accordance with this opinion.

DOWNEY, J., being president of the board of trustees of Indiana Asbury University, did not sit in the case.

J. Hanna and F. Kneflet, for appellants.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and J. W. Ray, for appellees.

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THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY v. RILEY, ADMINISTRATRIX.

INJURY TO PERSON.—Negligence.—Proximate Cause.—Railroad.—In an action against a railroad company for damages for an injury to a person, resulting in death, caused by the negligence of the servants of said company, where the instructions given by the court required the jury to find whether or not the death of the deceased was caused by the act of defendant; *Held*, that it was not error for the court to refuse to instruct that they should find whether or not the act of defendant was the proximate cause of the death of defendant.

SAME.—Railroad.—In such an action, it is not error in the court to refuse to instruct the jury that the injury complained of cannot be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him, producing his death, would not have produced the death of a well person.

SAME.—Passenger.—It is not necessary that a person should be on the train of a railroad in order to be regarded as a passenger. As a passenger, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street along-side of the track and platforms; and the servants of the rail-

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road company are bound to exercise the care of a reasonable and prudent man in the discharge of their duties on said platforms and street, and have no right to throw sticks of wood from the train upon such platforms or street, without first ascertaining whether such action would endanger any passenger standing or walking there.

SAME.—*Degrees of Care.*—A railroad company owes a higher degree of care and watchfulness to its passengers than to mere strangers.

PRACTICE.—*New Trial.*—*Evidence.*—*Appeal.*—The action of the court in improperly sustaining or overruling a motion to suppress a deposition, or a part thereof, is cause for a new trial, and must be stated as a reason for a new trial in the court below to entitle it to the consideration of the Supreme Court.

SAME.—*Evidence.*—It is not error to exclude evidence, admissible for one purpose, when offered for another specific purpose for which it is inadmissible.

EVIDENCE.—*Witness.*—The conviction of a person of a felony, which by the Revised Statutes of 1843 rendered him incompetent to give evidence in a court, under the Revised Statutes of 1852 may be shown for the purpose of affecting his credibility.

SAME.—The refusal to admit, as evidence, an *ex parte* affidavit and proceedings thereunder, not in the nature of an inquisition, to procure the admission of a person to the insane asylum, was held not erroneous, in an action by the administratrix of an estate of such person, deceased, against a railway company for damages for injuries resulting in his death, the same fact having been shown by other evidence.

NEW TRIAL.—*Evidence.*—*Appeal.*—When the reason for a new trial is stated simply as the error of the court in the admission of incompetent and irrelevant evidence in the testimony of a certain witness, and the objection is not made more specific in the brief, the Supreme Court cannot know upon what to decide.

DAMAGES.—Damages in the sum of two thousand three hundred and thirty-three dollars and thirty-five cents were held not to be excessive in this case for an injury to a person resulting in death.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, J.—The appellee sued the appellant, alleging in her complaint that, on the 21st day of February, 1867, the defendant was, and now is, a corporation, by virtue of the laws of the State of Indiana, and was then running and maintaining a railroad to and from Jeffersonville, in the State of Indiana, to Indianapolis, in said State; that on said day Frederick Riley, since deceased, was a passenger on one of defendant's passenger trains, then *en route* from Jeffersonville to Indianapolis; that at Seymour, a station on said railroad, the said train stopped to give the passengers an opportunity to procure refreshments, and

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while said train was at said station, and not in motion, the said Frederick Riley was standing upon the station platform, at the side of and near said train, and was again about to enter said train to resume his seat therein, before the starting of said train, when one James Wheadon, a brakeman on said train, and then in the employ of said defendant as such, and while attending to the business of his said employment in regulating the fires in the stoves in said passenger cars, so negligently and recklessly deported himself therein that, in throwing a burning stick of wood from said passenger cars, he, with said stick, struck the said Frederick Riley upon the head, inflicting a severe injury thereon, from the effects of which he, the said Frederick Riley, departed this life, at said county of Marion, on the 4th day of October, 1867; and the plaintiff says that said injury was done, and happened to the said Frederick Riley, without any fault or negligence on his part; and plaintiff further says, that she has been duly appointed and qualified, as administratrix of the estate of him, the said Frederick Riley, by letters of administration issuing out of the clerk's office of the court of common pleas of said county of Marion; that she, Malinda Riley, who, as administratrix, brings this suit, was, at the time of the happening of the injury above complained of, and at the time of the death of the said Frederick Riley, his lawful and wedded wife; that there was no issue of such marriage, and that the said Riley left no children surviving him; wherefore plaintiff prays judgment for five thousand dollars.

The complaint was traversed by a general denial filed by the defendant. There was a trial by a jury, a verdict for the plaintiff for two thousand three hundred and thirty-three dollars and thirty-five cents, a motion for a new trial made by the defendant overruled, and final judgment rendered for the plaintiff for the amount of the verdict. There were seventeen reasons assigned for a new trial, as follows:

- 1st. The verdict of the jury is contrary to law.
- 2d. It is not sustained by sufficient evidence.

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- 3d. The damages are excessive.
 - 4th. The giving of instructions one, two, three, four, five, and six, on its own motion by the court.
 - 5th. Refusing to give instructions one, two, three, four, five, six, seven, eight and nine, asked by the defendant.
 - 6th. In admitting incompetent evidence in the testimony of Freeman C. Bishop.
 - 7th. In admitting incompetent evidence in the testimony of John Kirkpatrick.
 - 8th. In admitting incompetent and irrelevant evidence in the testimony of Henry Taylor.
 - 9th. In suppressing a portion of the answer to the second question of the deposition of Edwin Cook.
 - 10th. In suppressing a portion of the fifth question in the examination in chief of Jany Cook.
 - 11th. In suppressing a portion of the answer to said question.
 - 12th. In suppressing a portion of the second question in the examination in chief of Jesse Florer.
 - 13th. In suppressing a portion of the answer to said question.
 - 14th. In suppressing a portion of the answer to the sixth question in the deposition of James C. Riley.
 - 15th. In suppressing a portion of the answer to question nine in the deposition of James C. Riley.
 - 16th. In excluding from the jury the indictment against Augustus Roller, and the record of the court in the case showing his conviction, offered by the defendant.
 - 17th. In rejecting the affidavit and other proceedings under which Frederick Riley was sent to the Insane Asylum.
- There are nineteen errors assigned, but we think the assignment that the court erred in refusing to grant a new trial, brings before us all the reasons which were urged for a new trial, and requires us to examine as to the correctness of the ruling of the court with reference to them, and that their repetition in the assignment of errors is useless. We are not aware that it has been decided by this court whether

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the suppressing of a deposition, or part thereof, or the overruling of a motion for such purpose, is a ground for a new trial or not. It seems proper that the question should be passed upon in this case, as the question is here presented. Motions to suppress depositions, or parts thereof, are generally made and decided before the trial has commenced, but not always. 2 G. & H. 178, sec. 266; *Barber v. Lyon*, 8 Blackf. 215; *Haslett v. Gambold*, 15 Ind. 303. So applications for the continuance of a cause are generally made before the trial has commenced, but not always. 2 G. & H. 198, sec. 323. But it has been held that the overruling of a motion for a continuance is a ground for granting a new trial, and that it must be urged at that stage of the case, or it cannot be assigned for error, and then only by assigning the improper overruling of the motion for a new trial. *Kent v. Lawson*, 12 Ind. 675. The first class of reasons for granting a new trial, are these: "Irregularity in the proceedings of the court, jury, or prevailing party, or any order of court or abuse of discretion, by which the party was prevented from having a fair trial." We conclude that improperly sustaining or overruling a motion to suppress depositions is cause for a new trial, and must be stated as a reason for a new trial, as was done in this case. We are confirmed in the correctness of this view from the fact that the eighth class of reasons for a new trial is "error of law occurring at the trial, and excepted to by the party making the application," etc. We will proceed, then, to examine the causes assigned for a new trial.

Nothing is urged under the first reason for a new trial.

The evidence showed the following facts: The deceased was a passenger on the train of cars on the defendant's road on the 21st day of February, 1867, from Jeffersonville to Indianapolis. The train stopped at Seymour for refreshments. The railroad runs along a street of the town running north and south. At the point where the train stopped, there is a platform on the east side of the road, between the track and the passenger depot, four hun-

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dred and twenty-six feet long, and twenty-one feet wide in front of the depot. On the west side of the track, there is a private platform six feet wide and one hundred and fifty feet long. From this platform, near the north end, there is a plank walk to the west side of the street, where the restaurant, or dining rooms, are situated. The deceased had gone to the restaurant and obtained a cigar, and had returned to a point some six feet from the train, and was standing near the narrow platform, the passengers who were eating not yet having finished their meal. Wheadon, the brakeman, whose deposition was taken by the defendant, who threw the stick of wood, testified as follows:

"I have a knowledge of the transaction in litigation; it occurred at Seymour, Ind., in February, 1867; the man was a passenger from Jeffersonville to Indianapolis; the train stopped at Seymour fifteen minutes for supper, about half-past four P. M.; the eating house is on the west side of the street, about forty feet from the passenger platform; there is a narrow platform on the west side for accommodation of passengers getting off for meals; the passenger platform is on the east side of the track; this occurred while the cars were waiting for the passengers in the eating house; there was a stick in the stove so long that I could not close the door; it was making a smoke in the car; I took it out of the stove, and took it to the door to throw it into the street; by this time it was beginning to burn my hands sharply, and I was trying to throw it as quickly as I could on the side opposite the regular passenger platform; as I was beginning to throw it I saw no one, but before it had got entirely out of my hands I saw Mr. Riley, if that was his name; it was then too late to stop, but I made an effort to give it a direction over his head; the stick was all afire; it singed his cap, but did not cut through it; he neither fell nor staggered, but immediately ran toward the eating house; I followed and overtook him, when he turned and drew a revolver partly out of his pocket; I seized his arms and asked him if he was hurt; when he saw that I was not going to hurt

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him, he said he thought somebody had shot at him, as there was a man on the train who wanted to kill him; then he went into the car and sat down; after the cars started, he commenced talking loudly about the carelessness in throwing a stick that way; he was swearing, using abusive language, and threatening me; Thomas Dailey, the conductor, came and partially pacified him; before Dailey came along I made all the apology I knew how, but he would not accept them; after Dailey passed, I examined his head and his cap; I found no blood; the skin was nowhere broken, and I did not see the slightest appearance of any recent injury; I examined his head because he asked me, and said I had hurt him; he laid my fingers on a bump on the side of his head, left side above the ear; it was about the size of a hickory nut, and also passed my fingers along a ridge that passed around to the middle of his forehead, and said the stick had made these; the ridge was hard; the skin of same color as rest of forehead; the lump was hard and came up to a point or edge, felt like bone and seemed a continuation of the ridge; all this had the appearance of an old injury; think it impossible for the stick to fall around his head that way, for he was standing with his back to me when I threw the stick; had not known the man or spoken to him before that; at the time of throwing the stick there was a young man standing on the platform; he was about twenty years of age; I saw no one else; Riley was in company with a friend; at the time of the occurrence I was a brakeman."

Cross Examination: "The train was a fair load; the train had stopped about ten minutes when I threw the stick; I was standing between the baggage car and front coach; I had a pair of gloves on, with the ends of the fingers worn out, when I threw it; before I threw the stick, I did not step out far enough to look along the platform crossing the street, because the stick was burning my hand, and I began to throw it before I reached the door; it struck the ground about eight feet from where I stood; it fell beyond the man; the narrow platform crossing the street was two feet wide;

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Riley was not on the narrow platform; he was just off the platform; he was standing still, with his back to the train; about one-half of the passengers left the train; a portion had returned when I threw the stick; there were two passenger cars; it was a part of my duties that day to attend to the fires; I don't know that it was my duty to throw the stick out as I did, but it was my duty to see that the fire burned, and it would not burn with that stick in the stove; the bump was on the left side of his head; the ridge extended from the bump toward the forehead, horizontally; I found his cap slightly singed where the stick went by, on the side of the cap, same side with the bump; at first he was scared; he drew a pistol partially from his pocket, and said, after he reached the car, that he came within a hair's breadth of shooting me, that a man on the train wanted to kill him, that when the stick went by on fire, he thought he was shot at; after he got into the car he talked loudly, and used abusive language to me; his complaints were as to the injury and his suffering; his manner from Seymour to Indianapolis was more boisterous, and entirely different from his manner from Jeffersonville to Seymour; think there was no other brakeman on the train; none of the other employees were about when I threw the stick."

Re-examination: "I think there was carelessness in the manner in which I threw the stick; the error was in throwing the stick without looking where I threw it; I should have thrown it between the cars."

The testimony of the other witnesses, concerning the occurrence at Seymour, may vary slightly from that of Wheaton, but in substance it is the same.

John Kirkpatrick testified for plaintiff: "Am engaged in practice of medicine and surgery, and have been so engaged over twenty years; I met Riley on the streets for some months before this injury occurred, and prescribed for him once or twice during that time; I suppose he was twenty-eight or thirty years old; his general health good, so far as I saw; he was rather an active man physically, and of ordi-

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nary mental capacity; I never saw him at home until after the injury; I treated him then. He came to my office on 28th of February, 1867; he complained of an injury to his head, and showed me a point that had been bruised from some cause; it appeared to be a recent injury, a slightly bruised condition of the skin, some swelling in the cellular tissue; parts of it were elevated a little above the ordinary condition of the parts; it was not an incised wound, but evidently one from a bruise from some heavy, broad-surfaced object; the bruise had been occasioned by some surface that did not cut through the skin; the length of the bruise was between two and three inches; the bruise extended over two-thirds of the right side of the *os frontis*, crossed the coronal suture a little back from the front edge of the parietal bone; most of it was under the hair; I treated it with cold applications to the head, also constitutional remedies.

"The diagnoses of physicians in cases of this character are not generally clear as in injuries of a different kind. There are two distinct layers of bone separated by a softer substance forming the skull; one of those tables may be injured and the other not; in a great many cases it is difficult to detect with certainty the precise character of the injury; there may be an injury to both tables of the skull; one a fracture, the other a contusion with extravasation of blood. When the inner table is fractured, and the other one is not, it is often impossible to ascertain the character of the injury until the symptoms are advanced, and often there is no absolute certainty at all.

"After Riley first called, I saw him almost daily for a couple of months, and after that time I saw him occasionally. The effect of my treatment on the swelling and external appearances of injury was to dissipate them, but it did not do much to alleviate the constitutional injury; nothing but cold applications were made to his head. I did not feel authorized, from the symptoms, to resort to trephining; that would have been too great a risk. The result of this injury

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very materially impaired the general health of Riley; he became feeble, emaciated, and afflicted with aberration of mind, which afterward increased; his wife and mother-in-law attended him. It was four or five weeks before my attention was called to the fact that he was affected with insanity. He surprised me one day by coming into my office and talking incoherently on elections; he spoke of being elected to an office, and of giving me one; it may have been two or three weeks after I commenced treating him; there was not always the same degree of excitement about the brain, but the paroxysms seemed to increase with each return, until he became entirely insane.

"There are so many causes of insanity, and so many varieties of it, that it is very difficult to find a rule to indicate it on all occasions; and I do not know that the books lay down any uniform rule by which you can detect it. I considered Riley an insane man after the time I have mentioned, when I detected those indications of insanity; there was scarcely any subject that he talked about on which his mind was correct; he had a good many ideas in regard to personal danger; his mind wandered suddenly from one subject to another; I tried often to confine him to one subject, and there was always some erratic display that indicated he was insane; he seemed to be sound on no subject at all; it was almost a complete mental aberration; his complaint of pain in the head was always uniform. Before the time of the alleged injury, his mind seemed correct on most subjects, and after the injury, up to the time I spoke of, when he came to my office and surprised me by talking incoherently. He never was a man of a very vigorous mind. He placed his hands to his head very often; he would get up before a looking glass, take off his coat, and stand in a pugilistic attitude; he seemed to think some one was in front of him who wanted to fight, and he would go through motions as though in combat with him; he very frequently expressed pain, and pressed his hand on his head quite as

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often, and would sit sometimes for five minutes in that position. The soreness on the outside disappeared in ten or twelve days; I do not think the treatment did him any good; there was no abrasion of the skin. I saw him last about one week before he went to the asylum; when I saw him last his mental ailment was increasing; he came back from the asylum in October, I think; I saw him the next day after he came back, at Mrs. Bouchet, his mother-in-law's; he was very much reduced, a mere skeleton, with not one single faculty left, as it seemed to me; it was a low muttering delirium; he was so much changed in appearance that I would not have known him. He survived a few days after he came home; I saw him two or three times a day during that time; at that time he made the same complaint about his head, and held his hand, I think, on the left side of his head. I saw him after his death, looked at his head, saw no other mark of injury besides this one; when I first saw him I took it to be a recent injury, and prescribed for it as such. From what I saw of him before he went to the asylum and after he returned from the asylum, I was very clearly of the opinion—the impression—that the injury he received was the cause of his death."

Cross examination. "Cannot say how long I knew him; I saw him frequently on the streets four or five months before his injury; saw him at my office, and prescribed for him; I think the injury in his head was on the left side, between two or three inches long; not more than one inch of it was covered with hair; Its appearance, as far as exposed on the forehead, was a contusion; it had discolored the skin, and something of a rise, perhaps three-fourths of an inch; the elevation on each side gave evidence of a depression; it was a double ridge with a depression in the center; it was softer in the middle than at the sides; there was considerable elevation and discoloration; think any one could have seen it at a distance of five or six feet; I removed the swelling in the course of a few days.

"I do not know that there is any uniformity in regard to

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where the pain is felt; ordinarily, the pain is felt where the blow is received, and when it is felt on the other side, it is considered rather an anomalous case; there are some instances where a blow is received on the head, and the effects of it are not manifest for months, or even years, both as to the mind and pain; I do not think, though, that would be the rule by any means; before Riley went to the asylum, the pain seemed to center in his forehead; he was a nervous and excitable man, rather more than common; he had a vague idea that some one was going to hurt him; on one occasion he wanted to get out the back window; he said some one was after him, and he would run up stairs and close the doors; I made up my mind, from what the patient told me, and from what I saw, that the injury I have described in this case produced the result I have described; I was led to that conclusion because he described to me the symptoms I expected to find; there were fever, pain, and swelling about his head, indicating congestion; extravasation of blood about his head, cold extremities, followed by febrile symptoms; a peculiar expression about the eyes, quite common to injuries of that kind; and a dilating and contraction of the pupil of the eye; in some cases that would indicate a recent injury to the brain; a blow that would produce such an injury as that, would knock such a man as Riley down, if he was standing off of his guard; a man standing behind Riley could not have inflicted such a blow, unless he had been standing above him, or was a very tall man."

Re-direct examination: "I do not know how long after the injury was inflicted before I saw Riley the first time; in wounds such as this was, I have seen ridges appear within a half an hour or an hour after the blow was inflicted; in older persons it would be longer than in younger ones; taking a person of a family who are predisposed to insanity, with injuries inflicted on the head at a long time before, such a blow as this would probably have caused death and the consequences which I observed in Riley's case."

The testimony of several other witnesses for the plaintiff

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tended to show that the insanity and death of the deceased resulted from the injury received by him at Seymour. There was evidence on behalf of the defendant strongly tending to show hereditary insanity in the family of the deceased; that his habits were such as might have produced insanity; and several professional witnesses testified in opposition to the conclusions of Dr. Kirkpatrick. It is not for us to say, however, that the jury should have been controlled by the evidence of the witnesses for the defendant, rather than that of those for the plaintiff.

We think the evidence was such that we cannot disturb the action of the court in refusing, for this cause, to grant a new trial.

We cannot say that the damages are excessive. If the jury were satisfied, as they seem to have been, that the evidence was sufficient, they did not give excessive damages.

The instructions given by the court on its own motion, to which exception was taken, are as follows:

"1st. The first question for the jury to answer is, was the death of Frederick Riley caused by the wrongful act of the defendant, or the servant of the defendant?

"This question properly divides itself into two branches, that is to say, did the death of Riley result from the act of defendant? and if so, was the act a wrongful one?

"In investigating the first branch of this question, it is proper for the jury to take into consideration all the circumstances of the case as developed in the evidence, the condition of the physical health of the deceased at the time of the act, his mental condition as bearing upon his physical health and the cause of his death, and any, even the smallest fact in evidence, which may throw light upon this matter.

"2d. If Riley came to his death, not from the act of the defendant's servant, but from disease with which the act of such servant had nothing to do, then your verdict should, without further inquiry, be for the defendant. But if the deceased, from other causes, was in such physical condition that the act of the defendant's servant, which in the case of

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a healthy person would not have produced or caused the same effect, yet in this special case did cause the death, then you should answer this first branch of the inquiry in the affirmative.

"If, then, you find, from a preponderance of evidence, that the death of Riley was caused by the act of the defendant's servant, in the line of his occupation, you should further inquire whether that act was wrongful or negligent.

"3d. Riley, whether as a passenger on defendant's cars, or as a citizen, had a right to stand in the street, in or alongside of which the defendant's railroad was located, and being properly there, the defendant had no right, its servant no right, to throw sticks of wood from the train to the street, without first ascertaining whether such action would endanger the person of any one walking or standing there.

"4th. If Riley, being a passenger at the time of being struck, was standing or walking upon a platform provided for the convenience of passengers in leaving or entering the train, he had a right to be there; and while the defendant had a right to throw wood upon the platform from the car, her servants were bound to exercise care in such act, such as a reasonable and prudent man would exercise in such a place at such a time.

"If the act of the defendant's servant, in throwing the wood from the car platform, without seeing whether the act would endanger the person of another, was not that of a reasonable and prudent man, under the circumstances of time and place, then the servant was guilty of negligence, for which, if causing death, the defendant would be liable, unless the deceased was also guilty of negligence which contributed to the happening of the injury.

"If the injury, if any, done to Riley, was the result of mere accident, and not of carelessness on the part of the servant of the defendant, then the act was not wrongful.

"5th. If the jury find, then, from the preponderance of the evidence, first, that the act of the defendant's servant caused the death of the deceased; and, second, that the act so

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causing it was wrongful, as I have defined it, and that the deceased did not, by his own negligence, contribute to the happening of the injury, then your verdict should be for the plaintiff.

"6th. If the jury find for the plaintiff, they should assess some amount in damages. The law which confers the right of action is for the purpose of providing pecuniary compensation for the life which was lost by negligence.

"There is no fixed measure of the compensation. It is proper for the jury to take into consideration the circumstances and occupation of the deceased in making such an estimate.

"If his avocation was a criminal one, any advantage to be derived from it should not be taken into consideration in making such an estimate. What the jury should estimate as damages is, as nearly as the jury can estimate it, the value in money of the life that was lost. The jury should exercise a sound discretion in making such estimate; unless the act was one involving moral turpitude, the damages can only be compensatory, and not vindictive."

The instructions asked by the defendant and refused by the court are as follows:

"First. If the jury believe that the injury inflicted upon the head of Frederick Riley, by the brakeman of defendant, would not have produced insanity and death, if it had not been for the fact that he had prior to that time received severe injuries on his head, was predisposed to insanity, and had led a life of dissipation, and believe that insanity followed the blow merely because of these pre-existing circumstances, the blow cannot be regarded as the proximate cause of the death of said Frederick Riley.

"Second. The plaintiff cannot recover unless it is shown to your satisfaction by a preponderance of the evidence, that the blow inflicted on the head of Frederick Riley by the brakeman of defendant was the proximate cause of his death.

"Third. If the jury should find for the plaintiff, the amount of the recovery is not left by the law to the uncontrolled

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discretion of the jury. It is their duty, in estimating the damages, to consider the exact situation of Frederick Riley, his occupation, habits, family, and earnings.

"Fourth. There can be no recovery in this action, unless the defendant, by its employee, was guilty of some wrongful act. If you find that whatever injury, if any, was done to Riley was the result of accident, and not of carelessness on the part of employee of defendant, you should find for the defendant.

"Fifth. If the evidence shows you that Riley, deceased, at the time the stick was thrown, was out of the cars, and not upon the platform or railroad, but standing in the street, the defendant is not responsible for any injury suffered by him, because he was a passenger. The rule of liability would be the same as though he had not been a passenger.

"Sixth. The statute under which this suit is brought bases the right of recovery on a wrongful act or omission causing death. In determining whether the defendant by its employee was or was not guilty of such wrongful act, in this case, the same rule applies as though Riley had not been a passenger. The company by its contract to carry him, became bound to use extraordinary care during the transit, and would have been liable to him under that contract for any injury resulting from the want of such care. But, under the statute referred to, the question is a different one. The wrongful act referred to is not an act that is wrong, merely because it is in violation of a contract. It refers to an act or omission that in its own nature and operation is tortious and wrongful independently of contract. The rule of liability here is no more stringent than it would have been if Riley had not been a passenger.

"Seventh. Unless you find that the brakeman, in throwing the stick from the cars, failed to use ordinary care and prudence, you should find for defendant. If he did act with such ordinary care and prudence, the defendant is not liable.

"Eighth. The plaintiff, if entitled to recover anything, is only entitled to recover the actual pecuniary value to her of Riley's life. In estimating that pecuniary value, money that

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he might have made in the avocation of a professional gambler is not to be allowed. That avocation is criminal, and she is no more entitled to recover on account of money that might have been derived through that source, than she would be to money that might be obtained through theft or robbery.

"Ninth. In estimating the value of a life, the jury can only consider it according to the habits and occupation of the person at the time of his death, and this cannot have a calculation upon a possible future improvement of habits and occupation."

The objection to the first instruction given is, as we understand the brief of counsel, that it does not sufficiently and clearly inform the jury that the blow must have been the proximate cause of the death of the deceased. On this subject the defendant asked charges one and two, which were refused. Number one stated what would not be the proximate cause, and number two informed the jury that the blow must have been the proximate cause of his death. In number one the court was requested to inform the jury that if the injury inflicted upon the head of the deceased would not have produced insanity and death if it had not been for the fact that he had, prior to that time, received severe injuries on his head, was predisposed to insanity, and had led a life of dissipation, and the jury believed the insanity followed the blow merely because of these pre-existing circumstances, the blow could not be regarded as the proximate cause of the death of the deceased. Insanity may have been from one cause, and death from another. The insanity may have resulted from the "pre-existing circumstances," and the death may have been caused by the blow. If the jury should find that the insanity resulted from the predisposing causes enumerated, it would not follow that they should find that the blow could not be regarded as the proximate cause of the death of the deceased.

If it was intended to have the court say to the jury, that when a person has a tendency to insanity or disease, and

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receives an injury which produces death, but which would not have produced death in a well person, the charge was rightly refused. If death was the result of the pre-existing circumstances, and the injury had nothing to do with producing or accelerating the result, then the injury would not be the cause of death.

If by the proximate cause was meant, in the second instruction refused, what was indicated by the first charge, the second charge was correctly refused. The charge given by the court required the jury to find that the death of the deceased was caused by the wrongful act of the defendant. This was all that the statute required to be found to render the defendant liable. The jury could hardly have misunderstood the instruction. If the deceased died merely, and his death was not caused by the wrongful act of the defendant, the jury must have understood that they were to find for the defendant. Indeed, the court so expressly told the jury in the second charge given.

The third instruction given informed the jury that the deceased, whether a passenger or not, had a right to stand in the street, in or along-side of which the railroad was located, and, being properly there, the defendant had no right to throw sticks of wood from the train to the street, without first ascertaining whether such action would endanger the person of any one walking or standing there. This instruction, so far as it relates to a passenger, is correct; and it may also be correct in its relation to one not a passenger; but we do not find it necessary to decide this in this case.

The fourth instruction given is, we think, fully sustained by authority. It is not necessary that a person should actually be on the train of the railroad, in order to be regarded as a passenger, and have the rights of such against the company. He may sustain that relation and not be actually on the train or in a car. This, as well as other companies, had its places of stopping for refreshments. Accommodations for leaving the train, and going to, and returning from, the dining rooms, had been provided, and

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passengers were thus invited to leave the train for that purpose. This was a necessary and proper purpose. The deceased was not negligent or in fault in leaving the train, or in standing by it on his return. On the contrary, he was doing only that which was customary, and what he was, by the surroundings, invited and expected to do. It is true that he was not on the main platform in front of the depot, for that was on the other side of the train from the dining room. Nor does the evidence show that he was actually standing on the narrow platform on the west side of the train ; but he was near to it, and it seems to us that it is not material that he should have been exactly on that platform. We presume that there was no regulation or usage which required passengers to walk on the planks and nowhere else.

In the case of *McDonald v. The Chicago and North Western R. R. Co.*, 26 Iowa, 124, after a full examination of the authorities, this statement is made of the law: "Upon reason, that is, enlightened common sense, applied to the relation which railway companies sustain to the public, and applied to the nature of man and the mode in which the business of carrying passengers is practically and usually transacted, and upon the authority of decided cases, we are justified in laying down the following general rule as to the duty of such companies, to wit, that they are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." The same doctrine was affirmed in the same case, when again in that court, in 29 Iowa, 170. See, also, *Knight v. The Portland, Saco, and Portsmouth Railroad Co.*, 56 Maine, 234.

The two latter sentences of the fourth charge seem to us to lay down the law correctly on the subject of negligence, and covering the same ground as the fourth charge asked by the defendant, rendered it unnecessary to give that charge.

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No specific objection is made or occurs to us to the fifth and sixth charges given.

The fifth charge refused was correctly refused, if we are right in our opinion that the deceased was to be regarded as sustaining the relation of passenger to the railroad company.

The sixth charge refused asked the court, in substance, to say to the jury that the relation between the company and the passenger had nothing to do with the question as to the right of action given by the statute. Assuming, which we think we may do, that the words "wrongful act or omission," used in the act, mean the same as negligent act or omission, then it follows that there may be negligence when the relation of carrier and passenger exists, where the same act or omission would not be negligent if that relation did not exist. The statute does not say whether the act or omission, which gives the right of action, must be wrongful in itself, or whether it may be wrongful because it violates a duty imposed by contract. We think it may be either. The cases in this court have mostly been based upon acts of negligence or omissions which showed a want of proper care and diligence in cases where there was no relation resulting from contract, such as where a person has been killed by a train of cars at the crossing of a highway or street. But there are numerous cases where the relation between the parties and the duties imposed grew out of contract, and the negligent act or omission was in violation of that contract. It is scarcely necessary to cite authorities to show that a railway company owes a higher degree of watchfulness and care to those sustaining the relation of passenger than to mere strangers sustaining no such relation to the company. But see *The State of Maryland v. The Baltimore and Ohio Railroad Company*, and the same parties reversed, 5 Am. Law Reg. (N. S.) 397.

The matter contained in the seventh, eighth, and ninth charges refused was given in the charges of the court, in substance, and the court was not bound to repeat it.

The sixth, seventh, and eighth reasons for a new trial are

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for the admission of incompetent evidence in the testimony of Bishop, Kirkpatrick, and Taylor. It is not stated what part of their evidence was incompetent, and the objection is not made any more specific in the brief. We can decide nothing on the point, because we do not know upon what to decide.

The ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth reasons for a new trial relate to the suppression by the court of parts of depositions taken by the defendant. We have not been able to see any material error in this action of the court. Most of the suppressed parts of the depositions relate to the occupation of the deceased, showing that he was a professional gambler. This fact seems to have gone to the jury in the testimony which was admitted, and the fact was laid before the jury in the charge of the court. There was no error in the action of the court in this matter.

The sixteenth reason for a new trial is, that the court excluded from the jury an indictment against one Roller, who, was a witness for the plaintiff, and had testified for her, and the record of the court showing his conviction thereon of the crime of robbery. The statute of 1843 had this section:

"Every person, who may hereafter be duly convicted of the crimes of treason, murder, rape, arson, burglary, robbery, manstealing, forgery, or wilful and corrupt perjury, shall, ever after such conviction, be deemed infamous, and shall be incapable of holding any office of trust, honor, or profit, voting at any election, serving as a juror, or giving evidence in any court of justice."

While the present statute provides that no person offered as a witness shall be excluded from giving evidence, either in person or by deposition, in any judicial proceeding, by reason of incapacity from crime or interest, it at the same time provides that any fact which before its enactment might have been shown to render a witness incompetent might thereafter be shown to affect his credibility. 2 G. & H. 171, sec. 243.

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As the conviction of Roller of the crime of robbery would, prior to the statute, have rendered him incompetent, it follows, we think, legitimately, that under the present statute, his conviction was competent evidence to affect his credibility. But the bill of exceptions shows that the record was offered, first, "to identify Riley as the man who was with Roller, to fix the date," and when excluded as evidence for that purpose, it was offered "for the purpose of showing the associations and character and social position of Riley." For these purposes, we think it was not admissible. It is not shown how it was essential to introduce it to fix a date, and it had no tendency to show the character or social position of Riley. He was not a party to the record in any way. The seventeenth and last reason for a new trial is, that the court improperly excluded the affidavit and other proceedings under which Riley was sent to the insane asylum. The whole object of this proceeding was to procure the admission of Riley to, and his confinement and treatment in, the asylum. These facts were in evidence, and, so far as we can see, as fully shown as they could have been by the papers sought to be given in evidence. The affidavit was *ex parte*, and there was nothing in the nature of an inquisition in the proceedings upon it. It is probable that, for some purposes, these papers might, in a proper case, be admissible in evidence, but in this we do not see any reason for their admission.

The judgment is affirmed, with costs.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellee.

BARNES v. ROEMER ET AL.

RECORD.—*Process.—Bill of Exceptions.*—The summons and the return of service thereof should, without any order of court or bill of exceptions, be part of the record, in cases tried on default of appearance.

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SUPREME COURT.—*Evidence.—Presumption.*—The evidence not being in the record on appeal, the Supreme Court will presume it supported the finding and judgment of the court below.

SAME.—Where the judgment is for too large a sum, the application must be made first to the court below to correct it, or the Supreme Court will not examine the question.

APPEAL from the Grant Circuit Court.

PETTIT, J.—This suit was brought by the appellees against the appellant, on two promissory notes, with stipulations in them to pay attorney's fees and all expenses of collection. The summons, service, and return are all properly in the transcript. The defendant was defaulted, and the cause submitted to the court; finding and judgment for the plaintiffs for four hundred and twenty-nine dollars and ninety-nine cents, which included the amount of the notes and interest due thereon, and thirty-nine dollars and nine cents for attorney's fees and expenses. Bail for the stay of execution was put in, and afterward a new departure was taken by bringing this appeal. The errors assigned are, "first, the process in said cause is not made a part of the record, by order of the court or otherwise; second, the judgment rendered is for a much larger sum than is due on said notes; third, the complaint does not authorize judgment for more than said notes, and it is for a much larger sum."

To the first assignment of error, it is enough to say that the process, service, and return are in the record as they always should be in case of default, without any order of the court or bill of exceptions.

As to the second assignment of error, it is a sufficient answer to say that the evidence is not in the transcript, and we cannot see what it showed as to attorney's fees and other expenses, but must presume that it warranted the finding and judgment.

As to the third assignment of errors, we will say that the complaint fully and clearly warranted a judgment for more than the face of the notes and interest.

If the judgment was too large, the party aggrieved should have made application to the court below to modify or cor-

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rect it, before an appeal to this court. This doctrine has been uniformly held by this court. 1 Abbott Ind. Dig. 45, secs. 228, 229, and the collection of cases there cited. We cannot fail to see that this case has been brought here for delay merely, and not to correct any wrong or error committed by the court below, and in such case we feel it to be our duty to add the highest per cent. allowed by law.

The judgment is affirmed, with ten per cent. damages, at the costs of the appellant.

J. Brownlee and H. Brownlee, for appellant.

A. Steele and R. T. St. John, for appellees.

BENOIT, ADMINISTRATOR, v. SCHNEIDER, ADMINISTRATOR.

APPEAL.—Parties.—Personal Representative.—Heir.—Where both a personal judgment and a decree of foreclosure of a mortgage have been rendered in an action, and the judgment defendant has afterward died, upon an appeal from such judgment to the Supreme Court, the personal representative and the heir should unite as appellants.

39	591
163	562
163	563

TRUSTEE.—Successor in Trust.—If the deceased held the mortgaged land as trustee, and some one else has succeeded to the estate as succeeding trustee, that person should be a party to the appeal as the representative of the ownership of the real estate.

REFUSAL TO JOIN.—Query.—If, where both the personal representative and the heir ought to join in the appeal, either should decline, *query* whether notice may not be given to the party refusing to join, under section 551, p. 270, 2 G. & H.

APPEAL from the Cass Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellant's intestate, to foreclose a mortgage on certain real estate, executed by the deceased, in this form: "Joseph Henry Luers, Bp. Ft. Wayne," to the appellee's intestate, Bernard Joseph Force.

The defendant answered, first, the general denial; second,

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payment; third, set-off, setting out the facts particularly; and, fourth, set-off in a more general form. A demurrer to the third paragraph, alleging that it did not state facts sufficient to constitute a valid defence, was filed by the plaintiff and sustained by the court. There was a trial by the court, and finding for the plaintiff; motion for a new trial by the defendant overruled; and a personal judgment rendered against the defendant for the amount of the debt secured by the mortgage, with an order for the sale of the mortgaged premises. After the rendition of the judgment, the said Joseph Henry Luers, the defendant therein, departed this life. The appeal is taken by the administrator of his estate, and the errors are assigned by him. A motion is made by the appellee to dismiss the appeal, for the reason that the same is not taken by the proper party.

The statute provides, that in case of the death of any or all of the parties to the judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment. 2 G. & H. 271, sec. 552.

With reference to the revival of actions, the statute provides that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, or supplemental complaint, at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. 2 G. & H. 51, sec. 21.

By the first of these sections of the statute, we find that an appeal may be taken by, and notice given to, the persons in whose favor and against whom the action might have been

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revived, if death had occurred before judgment; and by the second it is provided that such revivor may be had by the representative of the deceased party, or the person who succeeds to his interest in the property or subject-matter in litigation. In this case, there is a general personal judgment, from which it seems quite clear, if there was no mortgage and foreclosure thereof, the personal representative alone might appeal. But as the judgment of foreclosure affects the real estate which at the death of the judgment defendant descended to his heirs, it is equally clear that the personal representative is not the successor in interest of the deceased, and cannot represent those to whom the title to the real estate has descended. If the mortgaged premises do not sell for a sum sufficient to pay the judgment, the personal estate of the deceased would then, if it did not before, become liable to pay the debt, or the residue thereof. For the mere purpose of foreclosing a mortgage and selling the premises, the heir, and not the personal representative, of the deceased mortgagor is the proper party defendant. *Slaughter v. Foust*, 4 Blackf. 379; *John v. Hunt*, 1 Blackf. 324. But we apprehend that no judgment for any residue which might remain due after applying the proceeds of the mortgaged premises could be had, payable out of the personal assets, unless the personal representative was a party to the action. If the heir can compel the executor to discharge the debt secured by the mortgage, out of the personal assets, which he probably can do, there is a greater reason why, in such a case as this, the administrator should have the right to appeal from such a judgment. 2 G. & H. 516, sec. 109. But, as the real estate has descended to the heir, and he is therefore interested in the reversal of the judgment, if it is erroneous, it seems that he is a necessary party to the appeal also. We conclude that when, as in this case, there is both a personal judgment and a judgment of foreclosure, the personal representative and the heir should unite in the appeal. We think that the heir alone should

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appeal when there is simply a judgment of foreclosure, as the personal representative alone may appeal from a mere personal judgment. But this question is not before us.

Having arrived at the conclusion, then, that both the personal representative and the heir are necessary parties to the appeal, it follows that the appeal in this case cannot be sustained in the name of the administrator alone. But it may be asked what shall be done if the heir will not unite with the personal representative in the appeal, or *vice versa*? We answer, without intending to decide the question, for it does not appear as yet in this case that the heir will not join, that, perhaps, in spirit, the provision made by sec. 551, 2 G. & H. 270, will apply. The personal representative and the heir might, in that case, be so far regarded as co-parties, that the one might appeal by serving the required notice on the other in accordance with that section.

The appeal is dismissed, with costs.

ON PETITION FOR A REHEARING.

DOWNEY, J.—A petition for a rehearing in this case presents as reasons therefor the following:

“First. That it is unnecessary to make the personal representatives of Luers parties to the cause, as Luers was only a trustee, and that a successor to his trust has been appointed.

“Second. That Luers was simply a trustee of the church, an unincorporated society, and as bishop held the real estate upon which the mortgage was given, and upon which the judgment was obtained below in trust for said congregation, and that as such trustee his personal representative had no interest directly or indirectly in the determination of the suit.”

Counsel seem to have misapprehended the decision of the court. It was not objected, as counsel seem to suppose, that the personal representative of the defendant below was not a party to the appeal. On the contrary, it is stated in the opinion that the appeal is taken by the administrator. We

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sought to convey the idea that the person or persons to whom the title to the mortgaged premises descended should also have been made parties to the appeal. If it be true, as contended, that the deceased held as trustee, of which however we have no evidence in the record, and some one else has succeeded to the estate as succeeding trustee, that person should be a party to the appeal as the representative of the ownership of the real estate.

The petition is overruled.

N. O. Ross and R. Magee, for appellant.

W. Z. Stuart, S. T. McConnell, and M. Winfield, for appellee.

SHAFER *v.* BRONENBURG ET AL.

SUPREME COURT.—*Evidence.*—The Supreme Court will not weigh the evidence given on the trial below, in order to determine the preponderance.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—Suit by the appellees, as indorsees, against the appellant, as maker, of a promissory note. Among the paragraphs of the answer, the sixth set up as a defence, that the consideration of the note was illegal, it having been given as the consideration for compounding a larceny; and the eighth alleged a want of consideration. The cause having been, by agreement of the parties, tried by the court, there was a finding for the plaintiffs, a motion for a new trial overruled, and judgment for the plaintiffs.

The errors assigned call in question the correctness of the action of the court in refusing to grant a new trial, and it is urged by counsel for the appellant that the preponderance of the evidence was in favor of their client. But we cannot weigh the evidence. In such cases, the matter must remain as decided in the court below.

Metzer *v.* The State.

An attempt was made to save and present a question relating to the admissibility of part of the evidence of a witness for the plaintiff; but the question is not presented by the bill of exceptions, as it should have been, to enable us to decide it.

The judgment is affirmed, with two per cent. damages and costs.

W. R. Pierse and H. D. Thompson, for appellant.

F. W. Sansbury, for appellees.

METZER *v.* THE STATE.

39 508
157 584

EVIDENCE.—*Cross Examination.—Conversation.—Criminal Law.*—Where, on the trial of an indictment for larceny in the stealing of a coat, a witness on examination in chief has detailed part of a conversation with the defendant, in relation to the subject-matter of the action, on cross examination it is competent to introduce all that was said in the conversation material to the case.

A witness having testified, in such an action, that he had charged the defendant with having stolen the coat, it was proper for the witness, on cross examination, to give the answer then made by defendant.

SAME.—*Parol Evidence.—Record.*—If evidence of a plea of guilty of a defendant before a magistrate on preliminary examination on a charge of felony be admissible on a final trial of an indictment for such felony, parol evidence of such plea should be excluded, until it has been shown that no entry thereof was made by the magistrate.

APPEAL from the Wayne Criminal Court.

DOWNEY, J.—The appellant was indicted of larceny for stealing a coat of the alleged value of ten dollars, and on plea of not guilty was tried by a jury, and found guilty; was denied a new trial, and sentenced to pay a fine of five dollars and be imprisoned in the state prison for two years. He appeals, and has assigned for error the overruling of his motion for a new trial. On the trial, one Henry Hill testified, on behalf of the State, that on Wednesday after the

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coat was said to have been stolen, he met the defendant east of Richmond about one and a half miles, on the national road, and recognized the coat as the coat of Albert Hill, which the defendant then had on, and that the witness then told defendant that it was the coat of said Albert Hill, and that it had been taken or stolen from the said Albert; and on the cross examination of said witness, the defendant asked said witness if said defendant did not tell him in said conversation, and as a part thereof, that he, defendant, had purchased said coat in Richmond; to which question and evidence the State objected, and the court sustained the objection. To this ruling of the court the defendant excepted. Counsel for the appellant contends that, as the State introduced evidence of part of the conversation, he had then the right, on cross examination, to go fully into all that was said in the conversation material to the case. The fact that the coat was found in the defendant's possession soon after it had been stolen, required that the defendant should explain how he came by it, and what he said in that conversation, and proposed to be proved, was competent to go to the jury for what it was worth as evidence for that purpose. It is a general rule that when part of a conversation, admission, or confession has been given in evidence against a party, he may, on a cross examination, or by fresh evidence from his own witnesses, prove the residue of the same conversation, admission, or confession, so far as it relates to the same transaction. The proposed cross examination was proper, and should have been allowed; that it was designed to prove what the prisoner said in his own favor, was no objection to it. Those parts of a conversation or confession which are against a party cannot be given in evidence, without opening the door for those parts which are favorable to him, and they may be called out by a cross examination of the same witness by whom the unfavorable parts have been narrated. 1 Greenl. Ev., secs. 201, 218, 449; *Rouse v. Whited*, 25 N. Y. 170.

The State offered to prove by parol that when the de-

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fendant was arrested and taken before the mayor for a preliminary examination, the affidavit was read to him, and that he pleaded guilty thereto. The defendant objected to this evidence, because, if such was the fact, it should be proved by the mayor's record of such proceeding and plea. The court overruled the objection, and the evidence was given, to which the defendant excepted. If there was a plea of guilty, under the circumstances, we should presume that it was entered on the docket, as it would have been the mayor's duty to have so entered it on his docket. Until it had been shown then that there was no such entry made by the mayor, we think the parol evidence should have been excluded. It is a familiar rule of law that parol evidence is not admissible to prove that which legally exists of record. 1 Greenl. Ev., sec. 86. We decide nothing as to the admissibility or effect of the confession or plea of guilty before the mayor, if any such confession or plea was made.

The judgment is reversed, and the cause remanded, to be certified to the warden of the state prison.

T. F. Study, for appellant.

D. W. Mason and B. W. Hanna, Attorney General, for the State.

THE DETROIT, EEL RIVER, AND ILLINOIS RAILROAD CO. ET AL. *v. BEARSS ET AL.*

RAILROAD.—Appropriation to.—Petition.—Notice.—A petition to the board of commissioners of a county to make an appropriation of money, by levying a special tax, to aid in the construction of a railroad, and the notices of election on the subject of the proposed appropriation, must specify the amount of money to be appropriated.

SAME.—Per Centum of Taxables.—A certain per cent. on the taxable property of the county is not a specific amount. WORDEN, J., dissented.

SAME.—Time of Levy.—The statute (3 Ind. Stat. 389) providing that the board of commissioners shall levy a special tax to aid in the construction of a

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railroad, at their regular June session, is mandatory, and a levy at any other time is void.

SAME.—*Forfeiture.*—Said statute provided that “a failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax,” etc., “shall forfeit the rights of such company to such donation.”

Held, that the railroad company must commence work in good faith, with the honest purpose of constructing the road within a reasonable time, taking into consideration the extent and character of the work to be done; and, that to do work manifestly to evade forfeiture, is not “to commence work” within the meaning of the statute.

SAME.—*Election.*—*Registry Law.*—*Repeal of Statute.*—Where the statute under which an election was held provided, that the last preceding registry of voters should govern, and prior to the day of election, the law requiring a registry was repealed;

Held, said election being held without regard to said registry, that it was a valid election.

SAME.—*Ballot.*—Where the statute prescribed that the ballots used in voting upon the question of an appropriation by a county or township, to aid in the construction of a railroad, should contain the words, “for the railroad appropriation;” and, at the election, a large portion of the ballots cast and counted contained only the words “for the railroad;”

Held, that the casting and counting of such ballots was an irregularity which would not affect the validity of the election.

SAME.—*Notice.*—*Evidence.*—*Sheriff's Return.*—The certificate of the sheriff that he has posted notices of election in ten public places in the township, is not defective for not specifying the places, and such certificate is *prima facie* evidence that notices have been posted in ten public places in said township. If, in fact, notices of an election be not posted in ten public places, as prescribed by the statute, the election will be invalid.

APPEAL from the Miami Circuit Court.

BUISKIRK, C. J.—The appellees filed their complaint in the court below, against the appellants, to enjoin the collection of a tax levied in Jefferson township, Miami county, Indiana, in pursuance of a vote of the citizens of said township, to aid in the construction of the Detroit, Eel River, and Illinois Railroad through said township. A temporary injunction, restraining the collection of said tax, was granted by the court below, from which this appeal is taken. The following are the reasons set out in the complaint, why the collection of the said tax should be enjoined:

1st. That neither the petition, which was presented to the

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board of commissioners, nor the notice issued by the auditor, properly specified the amount to be appropriated by said township to aid in the construction of the said railroad.

2d. That no legal notice was given of the said vote, or of the time and place of holding said election.

3d. That the certificate of the sheriff as to the posting up of said notices of the said election in the said township was defective, because it did not specify the places at which he posted them, so that it could be ascertained whether they were public places.

4th. That the notices were not posted up in ten public places in said township.

5th. That there was a large portion of the ballots which were cast and counted in favor of said appropriation, on which were written, "For the railroad," instead of "For the railroad appropriation."

6th. That there was no registry of the qualified voters of said township at said election, nor was the last preceding registry before the said board of election.

7th. That the tax was levied in July, 1871, when it does not appear that there was a legally called session of the board, and when the act of May 12th, 1869, required that such tax should be levied at the regular June session of the board.

8th. That no work had been done in the said township in the construction of the said road within one year from the time of levying the special tax.

We will dispose of the objections urged in the order in which they are stated.

Did the petition specify the amount of money which was to be appropriated to aid in the construction of said road? The amount asked for in the petition, and that stated in the notice, was "two per cent. upon the taxables of said township." The first section of said act reads as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* That whenever a petition shall be presented to the board of commissioners of any county in this State,

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at any regular or special session thereof, signed by one hundred or more freeholders of said county, asking said board to make an appropriation of money to aid a railroad company, named in such petition, then duly organized under the laws of this State, in the construction of a railroad in or through such county, or whenever such a petition shall be presented to such board of commissioners as aforesaid, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and then duly organized as aforesaid, in constructing a railroad in or through such township, by taking stock in or donating money to such company to an amount specified in such petition, not exceeding, however, two per centum upon the amount of the taxable property of such county or township, as the case may be, on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year, it shall be the duty of such board of commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such county or township, as aforesaid, to cause the same to be entered at full length upon the records."

The third section of said act reads as follows:

"SEC. 3. The auditor of such county shall immediately give notice, to be published for at least four weeks successively in some newspaper of general circulation in the county, or if none be published therein, in some newspaper most convenient thereto, and by printed handbills, to be posted in three public places in each township of the county where a county appropriation is prayed for, or in ten public places in the particular township where a township appropriation is prayed for in the petition. Said handbills shall be posted, by the sheriff of the county, three weeks prior to the day fixed for taking the vote of the county or of the particular township named in said petition, as the case may be, and the same, as well as said newspaper publication, shall notify the qualified voters of the county or of the particular

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township, as the case may be, that the polls will be opened on the day fixed by the order of the board of commissioners, at the several voting places in the county, or in the township, as the case may be, to take the votes of the legal voters thereof upon the subject of such county or township aiding in the construction of the railroad named in such petition, to an amount to be specified in such notice; and the auditor of the county shall make his official certificate that said notice was published, and said sheriff shall make his like certificate that said handbills were posted as required by this act, which certificates shall be entered upon the records of the board of commissioners, and shall be sufficient evidence of the facts therein stated."

It will be observed that the first section requires that the petition shall specify the amount to be appropriated, not, however, exceeding two per centum upon the amount of the taxable property of such county or township on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year.

It is required by the third section, that "the amount shall be specified in the notice."

The petition did not specify any amount. It asked for two per cent. on the taxable property of the township. Two per cent. upon the taxables of the township is a specific proportion, but not a specific amount. The amount of taxables varies every year, and the amount would not be the same in any two successive years. No year is mentioned in the petition, and it might mean the current year, or the year preceding, upon which the tax had recently been paid. This uncertainty is fatal. It is the amount that is required to be specific, and not the per centum. In the first section of the said act a clear distinction is made between the amount and the per centum, for it is provided that the amount shall be specified, which amount shall not exceed two per centum upon the taxable property of the preceding year. It is maintained by the appellants, that "that is certain which can be made certain." We do not think, from the language

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used in the first and third sections of the act under consideration, that the legislature intended that the tax-payers should be required to go to the tax duplicate and ascertain the amount of the taxables, and then make a calculation to ascertain the amount to be assessed. The amount is imperatively required to be specified, but there is a limitation placed upon the board, by providing that such amount shall not exceed two per cent. of the taxables upon the duplicate for the preceding year. When the amount of the appropriation is stated in the petition and the notice, in dollars and cents, the tax-payers will know the extent of the burden they are asked to assume. *The State, ex rel. Lexington, etc., R. R. Co., v. Saline County Court*, 45 Mo. 242; *The State v. Saline County Court*, 48 Mo. 390.

It was said in *Adriance v. McCafferty*, 2 Rob. N. Y. 153, that "where a statute, in effect, strips an individual of his property or title, or which in any way affects the same, its requirements must be strictly complied with to enable parties purchasing to acquire a title. Moreover, the requirements of the statute are the very conditions upon which the owner is divested of his title and property; and it does not lie with the court to consider whether the statute was reasonable, or whether the notice in this case nearly complied with the act; but whether the provisions of the statute have been literally pursued and strictly complied with. The two cases (*Culver v. Hayden*, 1 Vt. 359, and cases therein cited, and *Spear v. Ditty*, 9 Vt. 282) cited in the plaintiff's points establish this view." See Blackwell Tax Titles, 213.

The cases of *Wheeler v. Mills*, 40 Barb. 644, and *Bunner v. Eastman*, 50 Barb. 639, are very much in point, and fully sustain the views above expressed.

We are of the opinion that the petition and the notice were fatally defective, for not specifying the amount of the appropriation. This disposes of the first and second objections.

As to the third objection, we are of the opinion that the certificate of the sheriff, that he had posted up the notices in

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ten public places in the township, is *prima facie* evidence of the fact. While it would be the better practice for the sheriff in his certificate to state at what places he posted the notices, we do not think that the certificate would be defective for the failure to so state.

We are of the opinion that the fourth objection, if true in fact, would be fatal to the validity of the election, as the third section imperatively requires that the notices must be posted in ten public places in the township. There must be a strict and rigid compliance with this plain and undoubted requirement of the statute.

We are of the opinion that there is nothing in the fifth objection. It is provided in the second section of said act, that the judges and inspectors of elections shall be governed in the reception of votes by the laws then in force regulating general elections. No special registry shall be required as preliminary to the elections prescribed by this act, but the last preceding registry shall govern. Such an irregularity at a general election would not affect the validity of the election. See sections 14 and 15 of the act for contesting elections. 1 G. & H. 318; *Gass v. The State, ex rel. Clark*, 34 Ind. 425.

There is nothing in the sixth objection. The vote was taken on the 7th day of August, 1869. The registry law was repealed on the 13th day of May, 1869. 3 Ind. Stat. 235.

We are of the opinion that the seventh objection is valid and is fatal to the validity of the levy of the special tax. The twelfth section of said act reads as follows:

"Sec. 12. If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for state and county purposes, which tax shall be collected in all respects as other taxes are collected for state

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and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

The above section provides that "the board of county commissioners, at their ensuing regular June session, shall grant the prayer of the said petition, and shall levy a special tax of at least one-half of the amount specified in said petition." It is also provided in the latter clause of said section, "and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

We think that it is very manifest that the legislature intended that the levy should be made at the regular June session, and at no other time. In our opinion, it is mandatory, and not directory. If it should be ascertained within a month after the first levy at the regular June session that the sum levied was not equal to the amount specified in the petition, the residue could not be levied at any intermediate regular session. It can only be done at the next regular June session. There is no power given to make the levy at any other time than at the regular June session. It was said by this court, in *English v. Smock*, 34 Ind. 115, that "the board of commissioners is a court of inferior and limited jurisdiction, and it is well settled, both on principle and by authority, that where statutory powers are conferred on such a tribunal, and a mode of executing those powers is prescribed, the course pointed out must be strictly pursued, or the acts of such court will be *coram non judice* and void. When such a court has been entrusted with the exercise of discretionary powers, and the acts done are within the power conferred, and have been performed in good faith, then no court possesses the power to interfere with or control such discretion."

This leaves for our consideration and decision the eighth objection. The 18th section of said act reads as follows:

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"Sec. 18. A failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax, or failure to complete such railroad ready for use within three years from such levying, shall forfeit the rights of such company to such donation, unless the county commissioners, for good cause shown, shall give not to exceed one year's further time in which to complete the same, and the money raised by said special tax shall go into the general funds of the county or township, as the case may be, and be used accordingly."

The railway company, by answer, denied the truth of the allegations contained in the complaint in reference to the failure of the company to commence work upon the railroad within said township within one year from the levying of the tax. Affidavits and counter affidavits were filed. An affidavit was filed by the appellees, which was made by eighteen citizens and tax-payers of said township, in which it is stated, "that for more than one year after the levying of such railroad tax, to wit, for more than one year after the 15th of June, 1870, said railroad company failed to commence any work on said road within said county of Miami, nor was any work commenced on said railroad from the said 15th of June, 1870, until the 1st day of March, 1872, in said county of Miami. Said affiants further say, as they are informed and believe, one Harrison Grimes, a resident and large land-holder of Union township, in said Miami county (which township is not subject to any such railroad tax, being on the line of said railroad and interested in the same), on or about the —— day of ——, 1871, by a collusion with the officers and stockholders of said railroad company, and for the sole purpose of evading the provision of section 18 of the railroad act of May 12th, 1869, and preventing a forfeiture of said tax, went on the line where he supposed said railroad line would run and used a plow or scraper less than half of one day; that at the time there had been no letting of the work on said road; that said line of road was not defined, no stakes had been set by an engineer, and the

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work performed was under no contract for the construction of said road; and said work was of no value or benefit in the construction of said railroad, and done for no other purpose than as a pretence and to evade a requirement of law; all of which facts, as herein stated, are substantially true, as said affiants, from their own personal knowledge, and from the best information, believe true."

The appellants filed the affidavit of the said Harrison Grimes, who, upon oath, states that he is a resident of Miami county, Indiana, and has been for the last five years; that he was employed to work, and did work, for the Detroit, Eel River, and Illinois Railroad Company, on the railroad of said company, between the first and sixth days of June, 1871, at a point on said railroad within the township of Jefferson, in said county of Miami; that said work was done by him and others in his employ, and was done in grading the road bed of said railroad and preparing it for the ties; that said railroad company paid him for said work, and he gave a receipt to the company for the same; that said work is now progressing rapidly on said railroad, and bids fair to be completed within the next six months.

R. K. Charles and Samuel Lewis filed affidavits, in substance the same as that of Mr. Grimes.

It will be observed that Mr. Grimes does not controvert the truth of the statements in the affidavits filed by the appellees, "that at the time there had been no letting of the work on said road; that said line of road was not defined; that no stakes had been set by an engineer; and that the work performed was under no contract for the construction of said road." Mr. Grimes, in his affidavit, studiously avoids stating how much work he did, or how much he received from the company for such work. He seems to be equally cautious in his statement that the work was progressing rapidly. It would have been more to the purpose, and far more satisfactory, if he had stated what progress had been made in the construction of the said road in Miami county, and especially in Jefferson township, in said county.

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We are required to give a reasonable and common-sense construction to the eighteenth section, and one that will fairly carry into effect the legislative intention. It is provided that a failure to commence work within one year from the time of levying the special tax shall work a forfeiture, unless the time is extended by order of the board of county commissioners. What was intended by the phrase "to commence work?" We think that it means that the company shall commence work in good faith, and with the honest purpose of constructing the road within a reasonable time, taking into consideration the extent and character of the work to be done. The most favorable view that can be taken for the company is, that Grimes worked from the 1st to the 6th of June. His failure to state how many hands he had employed, and how many hours or days they worked, creates a very strong presumption that the time stated in the affidavit filed by the appellees was the true time. We know that railroad companies do not commence the construction of their road beds until there has been a survey of the route; until the exact location of the line has been fixed and the grades established. We cannot regard the work done in Jefferson township as any compliance with the plain and undoubted requirements of the eighteenth section of said act.

We entertain no doubt that the levy of the special tax was illegal and void, and that the decision of the court below was correct.

The judgment is affirmed, with costs.

WORDEN, J., concurs in the judgment, but is of the opinion that the petition and notice sufficiently specify the amount to be appropriated.

J. Morris, W. H. Withers, N. O. Ross, and R. P. Effinger,
for appellants.

H. J. Shirk, F. Mitchell, L. Barbour, and C. P. Jacobs, for
appellees.

IN MEMORIAM.

ON the fifteenth day of the May term, 1871, on motion of Hon. JOHN S. SCOBY, certain resolutions and a memorial of the bar of Decatur county, in relation to the death of Hon. ANDREW DAVISON, formerly a judge of the Supreme Court of Indiana, were ordered to be spread upon the record; and Hon. JAMES L. WORDEN responded on behalf of the court, as follows:

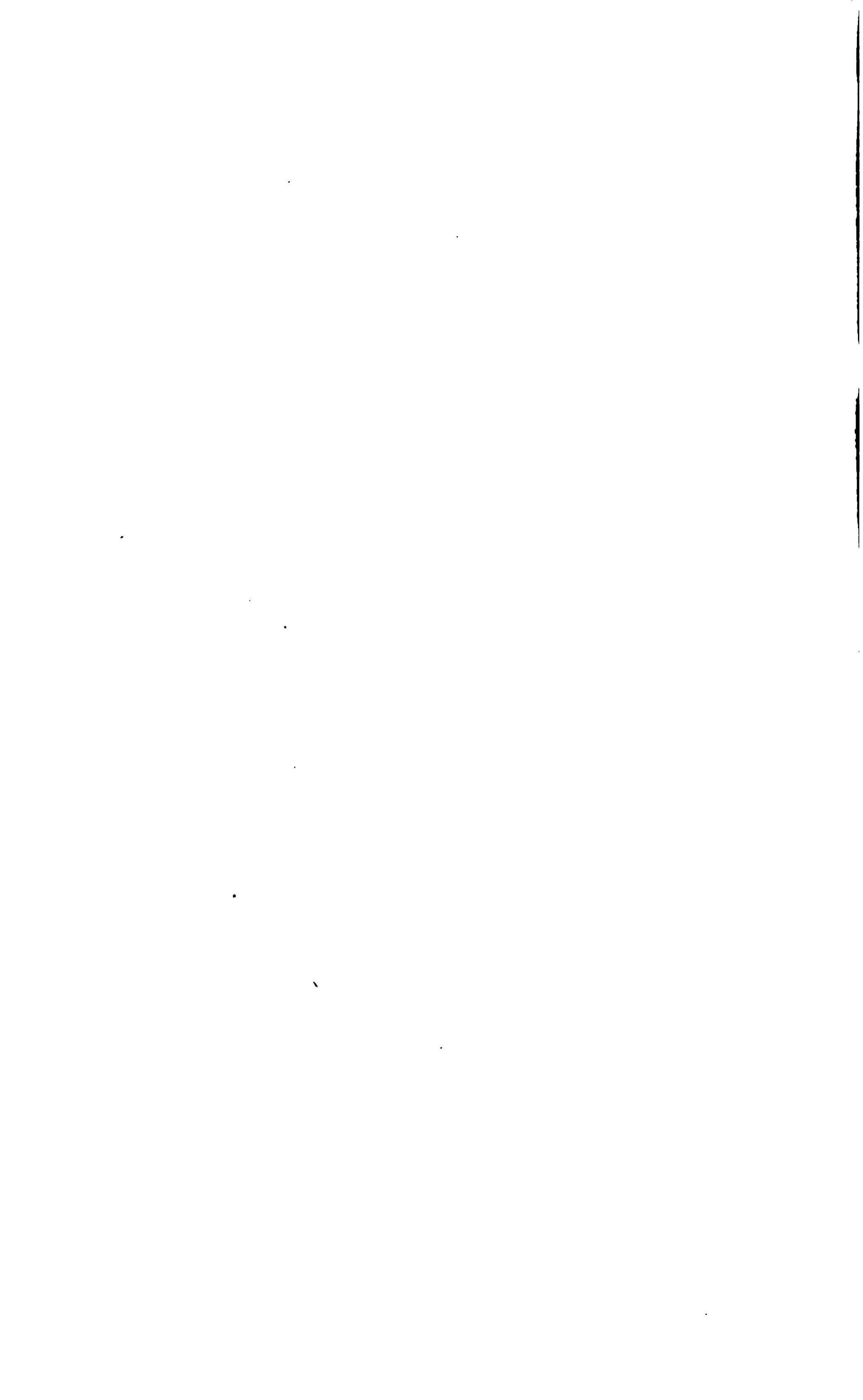
GENTLEMEN OF THE BAR:—It affords me great pleasure to have an opportunity, in responding on behalf of the court to your resolutions and memorial, to speak briefly of the eminent, just, and pure man who has passed away.

It was my fortune to occupy a seat on this bench with Judge DAVISON for the period of seven years, from January, 1858, to January, 1865, and therefore I had the opportunity of knowing him well, both as a jurist and as a man. A purer or more spotless man never graced the judicial ermine. He was never known, from any motive whatever, whether of personal friendship, partisan considerations, or otherwise, to swerve in the slightest degree from an upright and fearless discharge of his duty as a member of this court, and the administration of the law as he found it to exist. He administered what he believed to be the law, without considering where the blow would fall, or who would be injured or benefited thereby. In this respect, he may well be ranked with a MANSFIELD, a MARSHALL, a KENT, or a STORY. As a jurist, while he was thoroughly read in all the departments of law and equity, his mind intuitively, as if peculiarly formed for that purpose by nature, seized upon the broad and comprehensive principles of the common law as the distinctive field in which he delighted to revel, exploring the depths of its foundations, and tracing the entire fabric of its structure. He was, indeed, an eminent common-law lawyer while he was well versed in every department of jurisprudence.

Although the severe and laborious study of the law engrossed the most of his time during his youth and manhood, it is very evident that he failed not to feast upon lighter literature during his hours of leisure. He was conversant with the works of most writers of distinction, and it is believed that he relished the Waverly series of Sir Walter Scott more than any other writings of that class.

His mind was cultivated and refined, his manners easy and dignified, without the slightest approach to ostentation; and in his intercourse with others he was always gentlemanly and courteous. He was a genial companion, frank, open-hearted, and generous. Those who knew him best loved and respected him most.

Your resolutions and memorial, which are so full and expressive that little can be added, will be spread upon the order book of this court.



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6. *Same*.—*Taxes*.—The State may, for revenue purposes, impose a license fee for the carrying on of particular branches of business, and may confer the right upon a city, though the payment of the license fee operate incidentally as a tax upon the dealer or consumer*Ibid.*
7. *Same*.—*General Law*.—That the same license fee, as a tax, is not required by all the cities in the State, is no valid objection to the law conferring the power on the common council to pass such ordinance, or to the ordinance itself; for, though taxes must be uniform throughout the city levying them, they need not be the same throughout different cities. *Ibid.*
8. *Same*.—*Amount of License Fee*.—The exaction, by a city, of license money in the sum of five hundred dollars of each retail dealer of intoxicating liquors, cannot be considered, as a matter of law, unreasonable or objectionably prohibitory. *Ibid.*

CONSIDERATION.

See CONTRACT, 8; MORTGAGE, 7.

CONSTITUTIONAL LAW.

See CITY, 5 to 8; CORPORATION, 1 to 4; FEES AND SALARIES, 3; RAILROAD, 16, 17; SUPREME COURT, 17.

CONTRACT.

See DAMAGES; FRAUD; GARNISHMENT; MORTGAGE, 1, 2; RAILROAD, 7, 8; WARRANTY.

1. *Indemnity*.—A., at the request of B., borrowed of C. a certain sum of money, and gave C. his note for the same. A., as previously agreed, then let B. have the money, and B. made his note to A. for the same.

Held, that A. did not hold the note of B. as an indemnity, and he could recover of B. on his note without having himself made payment to C. *Yancy et al. v. Teter et al.*.....305

2. *Rescission*.—An agreement indorsed upon a deed for an interest in a patent right, that "all writings and

- papers heretofore executed between the undersigned concerning and touching the within patent right are rescinded and annulled," was construed to include deeds of conveyance of lands, given in consideration of deeds for interests in the patent previously executed, and to annul such conveyances of land. *Free v. Meikle*.....318
3. *Defective Work. — Acceptance. — Pleading*.—Where a complaint alleged that the defendant contracted to build walls and make the floor for a cellar, to be water-tight, and that the plaintiff was to furnish the cement, which he had done, but, owing to the unskillfulness of the defendant, the walls and cellar floor were not watertight; and the answer averred that the plaintiff had accepted the work, and given his note for the balance unpaid, which note was made a counter claim;

Held, that a reply was bad which admitted the execution of the note, but averred its only consideration to be the contract to build a cellar watertight for the plaintiff, who was to furnish the cement, and that he had furnished fifty barrels of cement, but owing to the unskillfulness of the defendant, the cellar was not watertight; the reply not alleging that fifty barrels were sufficient, or that the plaintiff did not know of the defect in the work when he gave his note. *Petrie v. Grover*.....343

4. *Termination by Notice.—Damages*.—Suit against a city for damages for violating a contract employing the plaintiff for one year to light the street lamps, and authorizing the defendant to terminate the contract by giving one month's notice in writing. The contract was terminated by the defendant without such written notice;

Held, that the following charge was correctly given: "It is of the contract between plaintiff and defendant that the defendant should have the right to declare the contract at an end after giving the plaintiff one month's notice in writing of such fact; and it is for you to find from the evidence whether such notice was given; then, after one month from the time when such notice was given, the defendant was no longer liable to

plaintiff. But if such notice was not given, then the plaintiff is entitled to such damages as necessarily resulted from the refusal, if any, of the defendant to allow plaintiff to fulfil his contract in lighting the lamps, which may be for such loss as the plaintiff actually suffered by being thrown out of employment during the time, or any part thereof, he was employed under the contract. Such notice must have been given by the city. A notice by a councilman, without authority of the common council, is not such notice. But a notice given by the city clerk, thereunto ordered by the common council, is sufficient."

The City of Indianapolis v. Bly. 373

5. *Specific Performance.—Statute of Frauds.*—Where a father induced his daughter, her husband and children, to break up their residence and move a long journey, at considerable expense, to a place near his home, that he might enjoy their companionship, by a promise to convey land to the daughter, and he, accordingly, purchased and placed them in possession of land, upon which they made valuable improvements, and of which he made a deed of conveyance to his said daughter, but had not delivered it to her when she died;

Held, in an action by the husband and children (after the death of the daughter), against the father, for specific performance of the contract, that there was a good and valuable consideration for the contract, it was not within the statute of frauds, and must be enforced in their favor.

Law v. Henry et al. 414

6. *Same.—Demand.*—The father wholly denying any obligation to perform said equitable contract, a demand of him for a deed was not necessary to entitle the husband and children to maintain said action. *Ibid.*

7. *Rescission.*—Where personal property is sold, and notes of a firm in which the vendor is a partner are surrendered to him in payment, and by a subsequent contract between the vendor and his firm, the notes are cancelled, and afterward, the partnership having become bankrupt, the contract of sale is rescinded, and also the contract between the vendor and the firm, and the purchaser under the contract of sale agrees to file a claim

against the estate of the bankrupt partnership, which one partner agrees to see paid if he lives, the rescission of the contract of sale is complete, although the notes delivered by the purchaser have not been returned to him, they having been destroyed. *Nash v. Caywood* ... 457

8. *Payment.—Extension of Time of.—Consideration.*—The giving of additional security by a person, not a party to a promissory note, is a valuable consideration for an agreement by the payee to extend the time of payment of such note. *Troyser et al. v. The Trustees of Ind. Asbury University et al.* 556

CORPORATION.

See BANKS AND BANKING; CITY; DRAINING ASSOCIATION; ESTOPPEL, 3; PLEADING, 9; RAILROAD; TURNPIKE.

1. *Constitutional Law.*—A county cannot, under section 6 of article 10 of the constitution, take stock in any incorporated company without paying the money down; and section 17 of the act of May 12th, 1869, for aiding railroads, does not conflict with this provision of the constitution. *B'd of Comm'rs of Crawford Co. v. The L., N. A., & St. L. Air Line R. W. Co.* 192

2. *Stock in Incorporated Company.—County Commissioners.—Voters.*—All the acts of county commissioners and the voters of a county, in taking steps to raise money to take stock in an incorporated company, are between themselves, one the principal, and the other the agent; there is no contract with the incorporated company, nor has she any right in, or control over, the matter, until the money is raised and the stock taken.

Ibid.

3. *Same.—Mandate.*—One or more of the voters might, in such case, maintain a suit for a mandate against the commissioners, to compel them to act, but the incorporated company cannot maintain such suit. *Ibid.*

4. *Same.*—Where money is raised for the purpose of taking stock in a railroad company, the company cannot have any of the money until she has fully constructed the road, so that

cars shall pass over the same; and no one but a petitioner or a tax-payer can have a mandate to compel the payment of the money.....*Ibid.*

COSTS.

See NEW TRIAL, 14 to 19; SUPREME COURT, I.

1. *Court of Common Pleas.—Recovery of Less than Fifty Dollars.*—In an action on an implied assumpsit, commenced in the common pleas, the plaintiff recovered forty-two dollars, the amount claimed by him not having been reduced by counter claim or set-off;

Held, that the plaintiff was liable for costs. *Stevenson v. Ennis*.....216

2. *Settlement of Action.*—Where the defendant in an action settles with the plaintiff, by payment of his claim, without any agreement as to costs, the defendant is liable for costs, at least to the date of the settlement.

The Jeffersonville Railroad Company v. Weinman.....231

3. *Number of Witnesses.—Taxation of Costs.*—On an appeal to the Supreme Court, it will not examine the general bill of exceptions and compare the statements of the witnesses, to determine whether more than three witnesses testified to the same fact, in order to decide a question of the taxation of costs. *The L., N. A., & St. L. Air Line R. W. Co. v. Dryden*.....393

4. *Summons for Witnesses.*—On a motion to tax costs, it cannot be held that more than one summons cannot be issued for witnesses of the same party, to the same county, at the same term of the court.....*Ibid.*

COUNTY AUDITOR.

See COUNTY COMMISSIONERS, I, 2.

COUNTY CLERK.

Statute.—Certificate of Clerk to Record.
Section 283 of the code is to be construed in connection with section 4 of the act providing for the election of clerks and prescribing some of their duties, in determining the sufficiency of the certificate of a clerk to

a record. Accordingly, a certificate enumerating certain papers is not sufficient, if it does not show that the papers named are "complete copies of all the papers;" nor does a certificate that "the record entries of same in the above entitled cause, now on file and of record in said office," cover and embrace "all the entries of such cause." *Wiseman et al. v. Lynn*.....250

COUNTY COMMISSIONERS.

See CITY, 3; CORPORATION, I to 4; RAILROAD, 10 to 17; SOLDIERS, I, 2, 3, 5, 6, 7; TURNPIKE, II.

1. *Auditor.*—Where the board of county commissioners have the power to act in relation to a given matter, their acts are valid and binding, even though they may be erroneous, and the auditor cannot refuse to issue his warrant in accordance therewith, unless such acts are appealed from and legitimately annulled. *The State, ex rel. Fullheart, v. Buckles, Aud.*....272

2. *Same.—Mandate.*—The writ of mandate is a proper remedy to compel the auditor to issue a warrant for money allowed by the board of county commissioners.....*Ibid.*

3. *Appeal.—Relocation of County Seat.*
A proceeding before a board of county commissioners to relocate a county seat is a special proceeding, for a special purpose, based upon a special statute which gives no right of appeal; and such proceeding, being special, cannot be governed by the general statute granting appeals (I G. & H. 253, sec. 31); and, therefore, no appeal lies from the decision of the board of county commissioners therein. *Hanna v. The Board, etc.*, 29 Ind. 170, and *Wright v. Harris*, 29 Ind. 438, criticised. *Bosley et al. v. Ackelmire et al.*.....536

COURT.

Term. *See* PRACTICE, 9.

Adjournment and Adjourned Term.
It is not necessary for a court to assign reasons for an adjournment and the holding of an adjourned term. *Cass v. Krimbill*.....357

COURT OF COMMON PLEAS.

See COSTS, 1; JURISDICTION, 1, 2.

COUNTY TREASURER.

See FEES AND SALARIES, 2.

CRIMINAL COURT.

See JUDGE, 2; RECOGNIZANCE.

CRIMINAL LAW.

See FEES AND SALARIES, 1.

1. *Practice.—Trial.—Construction of Statute.*—The word "trial," as used in section 120, 2 G. & H. 420, is not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in a criminal action from the submission of the cause to the jury to the rendition of judgment. *Jenks v. The State*.....1
2. *Same.*—In a criminal action, until a motion for a new trial which has been filed is disposed of, the cause is pending in court, and the parties are presumed to be in court.....*Ibid.*
3. *Bill of Exceptions.*—In the progress of the trial of a criminal action, a bill of exceptions was prepared and presented to the judge, but was not signed or filed with the clerk during that term, but was signed and filed at the second term thereafter, that being the term at which a motion for a new trial in the cause was determined and judgment rendered.

Held, that the signing and filing were within the time prescribed by the statute.....*Ibid.*

4. *Same.*—A bill of exceptions in a criminal cause cannot be signed and filed after the term at which judgment is rendered.....*Ibid.*

5. *Postponement of Trial.*—While a cause was being tried on an indictment for murder, and before the defence had closed, a material and competent witness for the defendant, who had been served with process, became seriously ill and unable to appear and testify; whereupon it was agreed, in open court, between the defendant and his counsel and those engaged in the prosecution, that if the witness should be able to appear at any time before the cause was submitted to the jury, he should be allowed to testify;

and if he should not be able to appear, then the defendant should have the same right to move for a postponement of the trial that he would have if the motion had been made before the close of the defence, and with like effect. With this agreement, the parties proceeded until the rebutting evidence on the part of the State was closed, whereupon, the defendant's witness not yet being able to be present, a motion was made to postpone the trial for eight days, which motion was supported by affidavits showing the materiality of the facts expected to be proved by the witness, and that during the trial he had been suddenly taken ill and could not, without great danger, leave his house, etc.

Held, that it was error to refuse to postpone the trial.....*Ibid.*

6. *Affidavit.—Justice of the Peace.*—Where an affidavit for an assault and battery is the basis of a prosecution before a justice of the peace, the defendant may be tried thereon on appeal without any information being filed. But such affidavit must enumerate and charge all the substantial elements that enter into the statutory description of the offence. Such an affidavit, that fails to charge the act to have been unlawful and done in a rude, insolent, and angry manner, or that does not contain an equivalent allegation, is defective. *Cranor v. The State*.....64

7. *Carrying off Products of Soil.—License.—Revocation.*—The defendant, in a prosecution for entering on land and carrying away products of soil, had sold hay to the prosecuting witness, on condition that he might enter, in the fall, into her corn-field, and gather and remove a sufficient amount of corn to pay for the hay. He entered to gather the corn, and she forbade him to gather. He proceeded to gather a quantity of a value less than that of the hay. The court, on the trial, instructed the jury, that a "license may be granted by parole; and as long as a party is acting under such license, he will not be a trespasser; but such license may be revoked at any time. If the defendant entered upon the lands of the prosecuting witness, under a parole license, and before he gathered any corn she

- forbade his gathering, and the defendant, after being forbidden, did gather and remove the said corn from the premises, without the consent of the prosecuting witness, the act was unlawful, and the defendant was liable.”
- Held*, that the charge was erroneous, as a license cannot be revoked, where it is coupled with an interest and supported by a valid consideration. *Miller v. The State*.....267
8. *Liquor Law.—Indictment.*—An indictment for selling intoxicating liquor need not state the kind of liquor sold. *Leary v. The State*..360
9. *Same.—“Barter and Sell.”*—An allegation that defendant “did barter and sell,” with an averment that the liquor was sold for twenty cents, is good, the word barter being regarded as mere surplusage.....*Ibid.*
10. *Same.—Allegation.—Proof.*—An allegation that the liquor was sold to be drank in the house, out-house, stable, yard, and garden where sold, does not vitiate the indictment, but may enlarge the proof to be made by the State.....*Ibid.*
- II. *Indictment.—Grand Jury.*—
Change of Venue.—Appeal.—Upon a change of venue from one court to another, in a criminal action, where the defendant was tried upon the original indictment, which in the introductory part recited the style of the court, the name of the county and state, the time and place of the meeting of the court, the names of the parties, and that the grand jurors, of the proper county, good and lawful men, duly and legally empanelled, charged and sworn to inquire, etc., and, where the record showed that said indictment was returned into open court by such grand jury;
- Held*, that it sufficiently appeared that the indictment was found by a legal grand jury. *Bailey v. The State*..438
12. *Separate Trial.*—By statute (2 G. & H. 416, sec. 105), where two or more defendants are indicted jointly, any defendant requiring it must be tried separately. *Trisler et al. v. The State*.....473
13. *Same.—New Trial.—Bill of Exceptions.—Supreme Court.—Assignment of Errors.*—The refusal of the court below to grant a separate trial, when required, to a defendant indicted jointly with others, is not one of the statutory causes for a new trial; and, hence, the exception to such error may be saved by a bill of exceptions, and the refusal assigned for error in the Supreme Court...*Ibid.*
14. *Indictment.—Disorderly House.*—An indictment for keeping a disorderly house must specify the acts of disorder, and unless it does so, should be quashed on motion. *Leary v. The State*.....544
15. *Evidence.—Reasonable Doubt.—Selling Intoxicating Liquor to Minor.* Where, on the trial of an indictment for selling intoxicating liquor to a minor, the evidence showed that the person who sold the liquor was, at the time of the sale, behind the counter of the saloon of the defendant, acting as bar-keeper, but did not also show that such person was the agent of the defendant, or was employed by him, or that the defendant had any knowledge of the sale;
- Held*, that the evidence was insufficient to show the guilt of defendant beyond a reasonable doubt. *Anderson v. The State*.....553
16. *Evidence.—Cross Examination.—Conversation.*—Where, on the trial of an indictment for larceny in the stealing of a coat, a witness on examination in chief has detailed part of a conversation with the defendant, in relation to the subject-matter of the action, on cross examination it is competent to introduce all that was said in the conversation material to the case.
- A witness having testified, in such an action, that he had charged the defendant with having stolen the coat, it was proper for the witness, on cross examination, to give the answer then made by defendant. *Metzer v. The State* ..596
17. *Same.—Parol Evidence.—Record.* If evidence of a plea of guilty of a defendant before a magistrate on preliminary examination on a charge of felony be admissible on a final trial of an indictment for such felony, parol evidence of such plea should be excluded, until it has been shown that no entry thereof was made by the magistrate.....*Ibid.*

D

DAMAGES.

See LANDLORD AND TENANT, 2; NEW TRIAL, 12; RAILROAD, 7, 9, 23; SUPREME COURT, 20.

Contract. — Speculative Damages. — Profits.—Suit for work and labor in the construction of a gravel road. A counter claim was filed, claiming damages for the failure to complete the road at the date contracted, and an item specified was "the loss of tolls she might have received." This item was struck out on motion.

Held, that the ruling was correct, as the damages were too vague and uncertain to be ascertained. *The Western Gravel Road Co. v. Cox et al.*.....260

DECEDENTS' ESTATES.

See EXECUTOR AND ADMINISTRATOR; WITNESS, 4.

DEFAULT.

See PRACTICE, 12, 13, 15, 16, 17, 18; RECORD.

DEMAND.

See CONTRACT, 5, 6.

DEMURRER.

See CONTRACT, 4; PLEADING, 13; PRACTICE, 20; PROMISSORY NOTE, 4.

Failure to demur. *See VENDOR AND PURCHASER, 3.*

1. A demurrer assigning no cause of demurrer should be overruled. *Jewett et al. v. The Honey Creek Draining Company*245

2. *Joint Demurrer.*—A demurrer to several paragraphs jointly, one of which is good, should be overruled.

Ibid.

3. *Pleading.*—No error can be committed in overruling a demurrer to a reply to a bad answer. *Yancy et al. v. Teter et al.*.....305

DEPOSITION.

See NEW TRIAL, 7, 20.

Retaking.—Taking by Other Party.

Although a party may not be at liberty to retake the deposition of a witness, except by leave of court, yet the taking of the deposition of a witness by one party to a suit does not prevent the other party from taking his deposition also; and one party may introduce both depositions in evidence. *Woodruff v. Garner*.....246

DIVORCE.

See SUPREME COURT, 2.

Order for Payment of Money.—Where, during the pendency of a proceeding for a divorce, the wife filed an affidavit that her husband was the owner of real estate of the value of six thousand dollars and personal property worth eight hundred dollars, and that she had no money or property to enable her to prepare her case for trial, it was proper for the court to order the payment by her husband into the clerk's office of one hundred dollars for her use. On an appeal from such an interlocutory order, no question will be considered involving the sufficiency of the complaint for a divorce. *Harrell v. Harrell*.....185

DRAINING ASSOCIATION.

1. *Suit on Assessment.—Defect in Articles of Association.*—In a suit by a draining association to compel the payment of an assessment made upon the lands of the defendant, the articles of association are not properly part of the complaint, and if it be attempted to make them a part thereof, advantage cannot be taken of a defect in them by demurrer. *The Etchison Ditching Association v. Busenback*362
2. *Pleading.*—A complaint to enforce a lien for the assessment of benefits under the act entitled "An act to enable the owners of wet lands to drain and reclaim them," etc., (3 Ind. Stat. 228) need not allege that, at the time when application was made to the board of commissioners for the appointment of appraisers, there had been made, by an engineer, a survey and estimate of the cost of construction of the proposed ditch; nor need it state the estimated cost of the work. *Shusser v. Ransom*.....506

E**ELECTION.**

See RAILROAD, 2, 17, 28, 29, 30.

1. *Ballot.—Distinguishing Marks.*—The words "Republican Ticket," or "Republican County Ticket," or "Republican Township Ticket," upon the face of a ballot, do not authorize the rejection of the ballot, under the 23d section of the registry act of 1867. *Millholland v. Bryant*...363
2. *Mandamus.—Inspectors of Election.*—The inspectors of a city election in the canvass of votes to ascertain the persons chosen at a city election are officers, and together constitute a board; their duties as such are ministerial, and not judicial, and a mandamus will lie to compel them to give a certificate of election to the person who, upon the face of the proper election documents, appears to have received the highest number of votes given. *Kisler v. Cameron et al*.....488

EQUITY.

A right in equity cannot grow out of an illegal and void transaction. *Mattox v. Hightshue*.....95

ESTOPPEL.

See TAX, 3; VENDOR AND PURCHASER, 3.

1. *In Pais.*—Where the maker of a promissory note is inquired of by a person proposing to take an assignment of the note, as to the validity thereof, and answers that he has no defence against it, he is estopped from setting up any defence against such person or his assignee. *Rose et al. v. Hurley*77
2. *Same.*—A party can never be estopped by an act that is illegal and void. *Mattox v. Hightshue*.....95
3. *Corporation.*—A party who contracts with a corporation, as such, is precluded from questioning the organization of the corporation. *Ray et al. v. The Indianapolis Ins. Co*.....290
4. *Pleading.—Promissory Note.*—In a suit by the assignee of a promissory

note, negotiable under the statute, against the maker, where the answer was want of consideration, there was a reply that after the purchase of the note, it was shown to defendant, who stated that it had been altered; that plaintiff thereupon told defendant that if it had been so altered, the assignor had committed a fraud upon the plaintiff, and that he would proceed at once to procure a rescission of said contract of assignment; that the assignor was then in the same town, but resided in New York; that the maker requested delay and promised to see the assignor, and did so see him, and returning, informed the plaintiff that the matter was satisfactorily arranged, and he would pay the note, and therefore the plaintiff did not rescind said contract; wherefore the defendant was estopped from denying his liability.

Held, that the reply was bad, as it alleged no damage to the plaintiff by reason of the promise. *Stutsman v. Thomas*384

5. *Evidence.*—Such promise might be given in evidence on the trial, but could not operate as an equitable estoppel.....*Ibid.*

EVANSVILLE.

See BANKS AND BANKING, 8, 9.

EVIDENCE.

See BILL OF EXCEPTIONS, 1, 2, 4; CITY, 2; CRIMINAL LAW, 15, 16, 17; DEPOSITION; ESTOPPEL, 5; FRAUD, 6; MISTAKE; NEW TRIAL, 1, 4, 6, 8, 10, 11, 20, 21; PRACTICE, 1; PROMISSORY NOTE, 2; STAMP; SUPREME COURT, 5, 9, 15, 19, 24; WARRANTY, 3; WILL, 2, 5, 6; WITNESS.

1. *Partnership.*—Entries in the account books of a firm, made prior to, and at the date of, any transaction in question, and open to inspection of the partners, are *prima facie* evidence against any member of the partnership. *Eden v. Lingenfelter*.....19
2. *Pleading.*—Evidence of fraud in procuring the execution of a promissory note is not admissible under a plea of want of consideration. *Hawkins v. Nation*50
3. *Cumulative. — New Trial.*—Evi-

dence which goes to the same point, but is different in kind, is not merely cumulative, and may entitle a party to a new trial on the ground of newly-discovered evidence. *Houston v. Bruner et al.* 376

4. *Practice.*—It is not error to exclude evidence, admissible for one purpose, when offered for another specific purpose for which it is inadmissible. *The J., M., & I. R. R. Co. v. Riley, Administratrix* 568

5. *Affidavits.*—The refusal to admit as evidence an *ex parte* affidavit and proceedings thereunder, not in the nature of an inquisition, to procure the admission of a person to the insane asylum, was held not erroneous, in an action by the administratrix of the estate of such person, deceased, against a railroad company for damages for injuries resulting in his death, the same fact having been shown by other evidence. *Ibid.*

EXCEPTION.

See BILL OF EXCEPTIONS; PRACTICE, II.

EXECUTION.

See PROCEEDING SUPPLEMENTARY TO EXECUTION.

Purchase Before Execution.—Although a judgment by confession has been obtained against a debtor, yet another creditor who purchases the personal property of the debtor without fraud, and to secure a precedence over the judgment, before an execution has been issued thereon, is entitled to the advantage obtained, although the debtor may have acted in bad faith toward his judgment creditor, the purchaser having no notice thereof. *Ball et al. v. Barnett, Adm'r* 53

EXECUTOR AND ADMINISTRATOR.

See WITNESS, 4, 5; SUPREME COURT, 21, 22, 23.

Assignment of Note.—An executor may transfer, by assignment, a note due his testator, so as to vest the title in the assignee. *Hamrick v. Craven et al.* 241

F

FALSE IMPRISONMENT.

See PLEADING, 17, 18.

FEES AND SALARIES.

1. *Criminal Law.*—Under the present statute (Acts 1871, p. 26, sec. 5), on an indictment or information against two or more, a separate docket fee is chargeable against each defendant, who pleads guilty, or who is convicted on a plea of not guilty. *The State v. Kinneman et al.* 36

2. *County Treasurer.*—*Delinquent Taxes.*—*Construction of Statute.*—A county treasurer, under the Fee and Salary act of February 21st, 1871, it was held, could not claim any percentage for the collection of taxes on his current duplicate, which taxes had been returned delinquent, but, not having been collected by the treasurer upon a precept issued to him by the county auditor for the collection of delinquent taxes, had been carried forward and placed upon the duplicate for the current year. *Wells, Aud., et al. v. Shoemaker, Aud. of State* 115

3. *Constitutional Law.*—The fee and salary act of 1871, so far as it fixes fees, is constitutional. *Leary v. The State* 360

FRAUD.

See WARRANTY, 1, 2.

1. *Fraudulent Representations.*—The purchaser of a patent right may rely upon the representations of the seller as to what is covered by the patent. *Rase et al. v. Hurley* 77

2. *Same.*—If there is no patent for a part of that which is exhibited by the seller to the buyer as an invention, there is fraud. *Ibid.*

3. *Pleading.—Answer.—Rescission.*—In a suit upon a promissory note given for a patent right, where the maker of the note defends on the ground of fraud in the sale of the patent, where the right has been conveyed to the maker, and he does not allege in his answer that he has made no profits out of its use or sale, or an

- offer to reconvey the right within a reasonable time after discovering the fraud, the answer is bad.....*Ibid.*
4. *Same.*—An allegation that a judgment debtor suffered certain mortgaged premises to be sold on execution, subject to incumbrances, for a nominal sum, is not sufficient to constitute a fraud on the part of the judgment debtor. *Lippert et al. v. Edwards et al.*.....165
5. *Same.*—In a complaint to subject real estate held by a wife to the payment of a debt of the husband, it must be clearly shown that the wife knew of the alleged fraudulent intent of the husband in causing the real estate to be conveyed to her, and that she took the conveyance in order to cheat, delay, or defraud the creditors.....*Ibid.*
6. *Evidence.—Rescission.—Waiver.*—Where a person is seeking the rescission of a contract, on the ground of fraud, evidence is competent which has a tendency to show that the conduct of said person has been such as to repel any inference that a fraud has been practised upon him, or to show that he adhered to the contract after having discovered the fraud. *Woodruff v. Garner*.....246

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

G

GARNISHMENT.

Warranty.—A contract recited that certain personal property was sold by A. to B., with a warranty that the value was a certain amount; and that the goods were to be paid for by C., who accepted the contract and agreed to comply with its terms.

Held, in an action by D. against A., in which process of garnishment was taken against C., that the latter might set up, as a defence to a note given by him to A. under said contract, the failure of consideration, in that the property was not of the value warranted, although the property had been delivered to B. *Ball v. The Citizens' National Bank*.....364

GUARDIAN AD LITEM.

See SUPREME COURT, 8.

H

HEIRS.

See SUPREME COURT, 21, 22, 23; WITNESS, 1, 2, 3, 4, 6.

HUSBAND AND WIFE.

See DIVORCE; FRAUD, 5; MORTGAGE, 1, 2; WILL, 5.

1. *Married Woman.—Conveyance.*—The separate deed of a married woman is void, and passes no title to her lands. *Mattox v. Hightshue*..95
2. *Same.*—A married woman holding real estate descended to her from a previous husband, cannot, with or without the consent of her husband, convey the real estate so held....*Ibid.*
3. *Same.—Vendee.—Void Contract.*—*Lien.*—One who has purchased real estate from a married woman who had no power to sell or convey, has no lien on the land to secure the repayment of the purchase-money; nor has he any right to retain possession until he is repaid the amount paid upon the void contract of purchase.....*Ibid.*
4. *Same.—Separate Real Estate.*—Where a married woman is the owner of real estate in her own right, and the proper steps have not been taken to create a mechanic's lien, in the absence of any contract made by her for the making of improvements thereon, and in the absence of evidence showing that the improvements made were necessary to the full and complete enjoyment of her separate property, neither she nor her real estate can be held liable for the making of such improvements. *Falkner et al. v. Colshear et al.*.....201
5. *Conveyance by Husband to Wife.*—A deed executed by a husband directly to his wife, in good faith, and in consideration of money of the separate estate of the wife, used by the husband in the purchase of the land conveyed by him to his wife, is valid, and was so held in an action for partition by the children of such a wife, deceased, as her heirs at law,

against the husband. *Thompson v. Mills et al.*.....528

I

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See BANKRUPTCY, 2, 3, 4.

INJURY TO PERSON.

See EVIDENCE, 5; NEW TRIAL, 12; RAILROAD, 19 to 23.

INSTRUCTIONS TO JURY.

See PRACTICE, 25.

After the argument on the trial of a cause had closed, the court said to the jury: "I have no instructions to give you. Defendant's counsel have requested me to instruct you in writing, which I am not prepared to do, having had no time to write them. If counsel require me to put my instructions in writing without giving me time to prepare them, they must do without them. You will therefore retire, in charge of your bailiff, and do what is right between the parties."

After having been out about five hours, the jury was brought into court, and they stated that they thought there was no prospect of their agreeing; whereupon the court urged them to come to some conclusion, giving some reasons why they should do so; after which they again retired, and in about two hours returned a verdict for the defendant.

Held, that it could not be said that the court did not instruct the jury.

Held, also, that the only error assigned being the overruling of a motion for a new trial, and no exceptions having been taken to the refusal or failure of the court to instruct the jury, and the evidence not being in the record, this court could not say that any other or different instructions were necessary. *Krack v. Wolf*.....88

INSURANCE.

1. *Mutual Insurance Company.—Receiver.—Assessment.—Embree v. Shideler*, 36 Ind. 423, adhered to. *Tippecanoe Tp., Carroll Co., v. Manlove, Receiver*.....249

2. *Same.—Receiver.—Complaint.*—In a suit by a receiver of a mutual insurance company, against a member of the company, for his proportion of losses, the complaint must show that the losses which are to be paid with the money to be collected from the assessments occurred during the time the defendant was a policy holder and member of the company. *Manlove, Receiver, v. New*.....289
3. *Same.—Assessment.*—In an action to recover an assessment upon a premium note given to a mutual insurance company, it must be alleged in the complaint, and proved upon the trial, that the losses to be paid accrued during the membership of the defendant in the company. *Manlove, Receiver, v. Bender*371
4. *Life Insurance.—Policy.*—Where a policy of life insurance, on its face, refers to the declaration, and the declaration refers to the particulars of the insured, given by him in answer to questions, these, as one instrument, constitute the agreement of the parties to the policy. *The Mutual Life Ins. Co. v. Miller, Adm'x*.....475
5. *Same.—Warranty.*—A covenant or agreement, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to and made a part of the policy. *Ibid.*
6. *Same.*—Questions propounded to, and answered by, the insured in his application for a policy are designed to induce a full and fair statement of the physical condition of the applicant, and the answers are warranties that the facts are as stated.....*Ibid.*
7. *Same.*—“*Spitting of Blood.*”—Where the applicant, to a question in the application whether since childhood he had had “spitting of blood,” answered “No,” which was untrue; *Held*, that the answer was material, and also a warranty that he had not had “spitting of blood” from any cause. *Ibid.*
8. *Same.—Representations.*—The difference between a warranty and a representation is, that a warranty must be true, while a representation must be true only so far as the representation is material to the risk; and it is material when a knowledge of the truth would have induced the insurers to have refused the risk or

charged a higher rate of premium.
Ibid.

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See PRINCIPAL AND SURETY, I.

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2. *Same.*—One who has paid, or agreed to pay, interest at a higher rate than ten per centum per annum, can only recoup or defend against the excess over ten per cent. *Yancy et al. v. Teter et al.....*305

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1. *Oral Appointment.*—A judge cannot, because he is "weary," orally authorize an attorney to receive the verdict of a jury. The fact that the counsel are present does not make the appointment effective. *Britton v. Fox et al.....*369
2. *Circuit Court.—Criminal Circuit Court.—Change of Venue.*—The act of December 20th, 1865 (3 Ind. Stat. 172), making Marion county the sixteenth judicial circuit, and establishing therein "a criminal circuit court," to be governed by the law in regard to circuit courts, and the 77th section of the criminal code, as amended on the same day (3 Ind. Stat. 548), providing that, on an application for change of venue, where the objection is to the judge of the circuit court, any other circuit judge may hold the court and try the cause, must be construed together, and the judge of the criminal circuit court be considered a circuit judge within the intent and meaning of said section as amended. *Ex parte Wiley.....*546

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1. *Suit On.—Statute of Limitations.*—

A. contracted to do certain work in the improvement of a street of a city; B. was his surety on a bond for the performance of the work. Afterward, in a suit of A., against B., it was adjudged that B. should pay and satisfy all indebtedness of A. on account of said improvement.

Held, that A., to whom certain claims for labor done in making said improvement had been assigned, could maintain a suit against B. on said claims.

Held, also, that by the judgment in said suit of A. against B., the claims assigned to A. became the debts of B., and no longer the debts of A.

Held, also, that the action of A., on the claims assigned to him, against B., was upon the former judgment of A. against B., and was not, therefore, barred by the statute of limitations, although the accounts for work and labor upon which the claims were based accrued more than six years before suit. *Root v. Moriarty.....*85

2. *Action.—Foreclosure.*—A mere judgment of foreclosure of a mortgage, without a personal judgment for the debt, or for the recovery of the residue after the mortgaged premises have been sold and the proceeds applied, cannot be made the foundation of an action for the purpose of collecting an unpaid balance of the debt secured by the mortgage. *Lippard et al. v. Edwards et al.....*165

3. *Equitable Interest in Land.*—To reach the equitable interest of a debtor in land, it is only necessary that the creditor should have obtained a judgment; while to reach personal property, both a judgment and execution are necessary. *Armstrong et al. v. Keifer et al.....*225

4. *Same.—Pleading.—Insolvency.*—In a suit on a judgment, to reach an equitable interest of the debtor in land, an allegation that the judgment defendant is insolvent is equivalent to a statement that he has no personal property subject to execution....*Ibid.*

5. *Appraisement.*—Where, to a complaint upon several different causes of action, part of which are collectible with, and part without, relief from valuation or appraisement laws, there are answers of payment and set-off, and, upon the trial of the is-

sues, there is evidence given supporting the answers, and only a general verdict is returned in favor of plaintiff for a sum in gross, a judgment rendered upon the verdict for part of the sum so found, with relief from appraisement laws, and part without such relief, is erroneous. *Jarboe et al. v. Brown*.....549

JURISDICTION.

See ARBITRATION AND AWARD; PROMISSORY NOTE, 1; SUPREME COURT, 2.

1. *Title to Real Estate.—Court of Common Pleas.*—In an action for partition between heirs, where the title to land as derived by a deed executed by a husband directly to his wife is in issue, the court of common pleas has jurisdiction to try and determine such issue as incident to the action. *Thompson v. Mills et al.*.....528
2. *Circuit Court.—Court of Common Pleas.*—The circuit court has the power and jurisdiction to set aside and declare void, as fraudulent, a judgment recovered in the court of common pleas, upon the complaint of a creditor of the judgment defendant, such creditor not being a party to said judgment. *Adkins v. Nicholson*.....535

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1. *Rent.—Void Contract of Purchase.*—A person who takes possession of a tract of land under a contract of purchase that is absolutely and unconditionally void, is liable for rent of the premises. *Mattox v. Highthue*...95
2. *Repairs.—Measure of Damages.*—Where a landlord agreed with his tenant that he would deliver sufficient rails to repair the fences, so as to

protect the crops on the farm, and the tenant sued to recover for a breach of such contract, alleging that, by reason of the breach, his crops were damaged, and the evidence did not show any want of diligence on the part of the tenant to protect his crop, notwithstanding the insufficiency of the fences, it was not error to instruct the jury that the damages of the plaintiff were not measured by the difference between the rental value of the farm as it was, and as it should have been according to the contract; and that the tenant might have repaired the fence and charged the cost to the landlord, if the latter did not furnish the rails within a reasonable time, but that if he, in good faith, waited for the landlord to furnish the rails, he could recover the damages actually sustained. *Buck v. Rodgers*.....222

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See CORPORATION, 3; COUNTY COMMISSIONERS, 2; ELECTION, 2; PLEADING, 22.

MECHANIC'S LIEN.

See HUSBAND AND WIFE, 4.

1. *Remedy.*—The remedy provided by section 649 of the code, for sub-contractors, journeymen, and laborers, employed in the construction or repair of a building, or furnishing materials therefor, is purely personal, while the remedy provided by section 650 is *in rem*. *O'Halloran v. Leachey*.....150
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- the remedy provided by that section, although he may also have taken the steps necessary to create a lien on the premises *Ibid.*
3. *Same.*—*Description of Premises.*—In a notice of intention to hold a mechanic's lien, the premises were described as "a certain building, three-story high, with the lower story finished off with a stone front, situated on the eighteen feet on the east side of town lot number fifty-eight, in Washington, formerly called Liverpool, in said county" (the county having previously been named in the notice);
Held, that the description was sufficient *Ibid.*
4. *Recording Notice.*—Notice of intention to hold a mechanic's lien must be recorded in a book kept for that purpose. Recording the notice in the mortgage record is a nullity. *Falkner et al. v. Colshear et al.*...201
5. *Pavement.*—The making of a pavement, in front of a lot and abutting thereon, cannot be regarded, in any sense, as the "construction or repair" of a building on such lot, within the meaning of the statute in regard to mechanics' liens; and therefore a mechanic's lien cannot be acquired for work done and materials furnished in the construction of such a pavement. *Kraube et al. v. Kerchner.*217

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1. *Contract.*—Where a mortgage is made to secure the payment of a

- series of notes, it is competent for the mortgagor to agree to pay attorneys' fees, and that on failure to pay one of the notes, all the notes shall become due and payable. *Jones et al. v. Schulmeyer* 119
2. *Same.—Married Woman.*—A married woman may bind herself, by her mortgage, in such a contract.... *Ibid.*
3. *Practice.—Motion for New Trial.*—In a suit upon a note and to foreclose a mortgage, where a new trial was asked for alleged error in receiving in evidence a note differing from the note described in the mortgage, the motion, it was held, should have pointed out in what particular the difference existed. *Dorsch et al. v. Rosenthal* 209
4. *Foreclosure.—Variance.*—In a suit to foreclose a mortgage, if a note is filed with the complaint, and alleged to be the same note mentioned in the mortgage, and it is proved on the trial to be such, this will cure a defective description of the note in the mortgage *Ibid.*
5. *Foreclosure.*—Where a mortgagee, whose debt, secured by the mortgage, is not due, is made a defendant in a suit to foreclose a subsequent mortgage, securing a debt which is due, and files a cross complaint setting up such prior mortgage, and asking its foreclosure, the court may decree the foreclosure of the subsequent mortgage, and order a sale of the property mortgaged, subject to the lien of the prior mortgage, but cannot foreclose the prior mortgage or order a sale to satisfy it. *Trayser et al. v. The Trustees of Ind. Asbury University et al.* 556
6. *Same.*—It is error to sustain a motion to strike out an answer to said cross complaint alleging that the debt secured by such prior mortgage is not due *Ibid.*
7. *Same.—Pleading.*—An agreement by the payee to extend the time of payment of a note secured by mortgage, in consideration of the execution to him, by a person not a party to such note and mortgage of a mortgage, as additional security for the payment of said note, is a good answer to an action commenced by said payee before the expiration of such extension, for the foreclosure of both mortgages *Ibid.*

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1. *Ground for New Trial.*—"Error of law in admitting illegal evidence", or "error of law in excluding competent evidence," is not, when thus stated, sufficiently definite as a cause for a new trial. *Eden v. Lingenfelter*.....19
2. *Motion for New Trial.—Misconduct of Jury.*—Alleged misconduct of the jury, consisting of statements made by one or two jurors in the jury room, that the defendant is "a wealthy man," if any reason for a new trial, is not sufficiently sustained by the oath of the defendant that he has been informed and believes that such statements had been made in the jury room. *Toliver v. Moody*..148
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6. *Same.*—The proper mode in which to reserve questions with reference to such conclusions of law is by excepting to them, and not by a motion to set them aside. Assigning error of law in the legal conclusions is no cause for a new trial.....*Ibid.*
7. *Pleadings Filed in Vacation.*—There is no law to prevent a defendant from filing an answer, or amended or additional answer, in vacation, when the other party has not completed the issues by reply.....*Ibid.*
8. *Joint Contractors.—Abatement of Action.—Dismissal.*—A. sued B. and C. before a justice of the peace, on a promissory note made by them. B. was served with process, but C. was not served, and the fact was so entered upon the docket. B. appeared to the action, and, after two continuances, the cause was tried, and judgment was rendered against B. Afterward, suit was commenced before another justice on the same note against C.
Held, that although there was no dismissal of the former action as to C., the going into trial and proceeding against B., under the circumstances, caused the action to abate as to C., and was, in effect, the same as a dismissal of the former action as to C., and saved the right of A. to sue him in the latter action. *Kittering v. Norville*.....183
9. *Court.—Term.*—If a trial is in progress at the time when by law the term of the court would expire, the term shall be deemed to extend to the close of the trial. *Dorsch et al. v. Rosenthal*.....209
10. *Motion to Strike Out.—Bill of Exceptions.*—When the court sustains a motion to strike out a paragraph, the paragraph is no longer part of the record, unless made so by bill of exceptions. *Busby v. Noland et al.*234
11. *Exception to Judgment.*—Conceding that the noting of an exception to a judgment, in the record, by the clerk, sufficiently saves the exception, without a bill of exceptions, still there must be some pointing out of the objection to the judgment as rendered. *Atkisson v. Martin et al.*242
12. *Default.—Judgment.*—Where a defendant has been brought into court, and has suffered a judgment to be rendered against him by default, he cannot appeal to the Supreme Court for the correction of any supposed error in the judgment, without having first applied to the court below for the correction. *Barnes v. Wright et al.*.....293
13. *Judgment by Default.—Appeal.*—Where a judgment has been taken by default, the defendants having been personally served, a motion to set aside the default, showing merits in the defence, or proceedings for relief from the judgment, or to review it, must be made in the court below, before appeal. *Barnes et al. v. Conner*294
14. *Pleading.—Mismener.—Amendment.*—A complaint upon a promissory note, containing a misnomer or an omission to set out the full name, where the summons contains the full name and has been duly served, may be amended to correspond with the summons; and on appeal, the Supreme Court will consider the amendment as made.....*Ibid.*
15. *Default.—Motion to Set Aside.—Notice.*—Where a motion to set aside a default is made at the term when judgment has been rendered, notice of the motion is not required; if made at a subsequent term, notice should be given. *Yancy et al. v. Teter et al.*305
16. *Same.*—A motion to set aside a default must be supported by affidavit, and it must be shown that the party has a valid or meritorious defence, and the defence itself must be set out; and facts must be set out showing why an appearance was not made to the action before default, showing that the default was taken "through his mistake, inadvertence, surprise, or excusable neglect".*Ibid.*
17. *Same.*—Where a judgment has

- been taken by default, a motion to set aside the default, or proceedings for relief from the judgment, or to review it, must precede an appeal. *Ibid.*
18. *Same.—Appeal.—Error.*—Where a complaint is sufficient, and judgment thereon has been taken on default, the question whether the judgment has been taken for too large a sum cannot be presented on appeal for the first time. *Barnes et al. v. Bell et al.*.....328
19. *Amendment After Verdict.*—Where a promissory note includes the payment also of "all necessary expenses of collection," although there be no averment in a complaint on such note of what such expenses are, still, after verdict the amendment will be regarded as having been made, and the judgment will not be reversed for want of such averment.....*Ibid.*
20. *Demurrer.*—The sustaining of a demurrer to a pleading is not available error, when the same evidence may be introduced under another pleading in the cause. *Bouslog v. Garrett*.....338
21. *Appeal.—Justice of the Peace.*—An appeal from the judgment of a justice of the peace has the effect to vacate the judgment, and brings the case into court for a re-trial, as if it had not been before tried. The appellate court is not a court of errors. *Britton v. Fox et al.*.....369
22. *Special Finding Without Request.*—A special finding will not be regarded as having been made under section 341 of the code, unless it appear to have been made at the request of one of the parties to the action, and it will be treated as nothing more than a general finding. *Nash v. Caywood*.....457
23. *New Trial.—Assignment of Errors. Supreme Court.*—Errors occurring during the trial of an action in the court below must be set forth in a motion as reasons for a new trial, and, except the overruling of that motion, cannot be assigned for error in the Supreme Court. *The Mut. Benefit Life Ins. Co. v. Miller, Adm'r.*....475
24. *Same.—Judgment.*—If a motion for a new trial is correctly overruled, judgment follows as of course, and the assignment of error that the court below erred in rendering the judgment has no foundation.....*Ibid.*
25. *Instructions.*—Where counsel for a party, openly, in court, in the presence of the adverse party, asked the court that the instructions to the jury be in writing, and afterward, when it was too late for the adverse party to make such request, withdrew his request, the adverse party could not complain of such withdrawal; for, if he desired the instructions to be in writing, he should have preferred his own request.....*Ibid.*
26. *Inspection of Books and Papers.*—Section 306, 2 G. & H. 191, relates simply to obtaining, by rule or order of court, inspection and copy of a book or paper in the hands of a party, without any reference to its production in court. *Whitman, Receiver, v. Weller*.....515
27. *Production of Books and Papers in Court.*—Under section 305, 2 G. & H. 191, to justify an order for the production of a book or paper, it should be shown to be in the hands of the party against whom such order is asked.....*Ibid.*
28. *Same.—Order of Court.*—An order for the inspection or production of a book or paper in the hands of a party should specify and designate with reasonable certainty the book or paper, that such party may know what book or paper is to be inspected or produced
29. *Same.*—An order to inspect or produce books or papers should not be made in such terms as to license the party obtaining it to search the books and papers of his adversary at pleasure; nor should an order be made to produce books or papers which may be of no use when produced....*Ibid.*
30. *Same.—Motion.*—Upon a motion to produce in court certain books and papers, the court cannot order generally all the books and papers of a corporation to be produced.*Ibid.*
31. *Same.—Copies of Documents.*—If a copy of books or papers, or the parts thereof shown to be material, be furnished under order of court, with consent to its use as evidence, the court need not, except for special reasons, compel the production of the originals.....*Ibid.*
32. *Same.—Dismissal of Action.*—The court may dismiss the action of a party refusing to obey an order to

- produce a book or paper.....*Ibid.*
33. *Open and Close.*—In an action for partition, where the petitioners claimed title to the land by descent, as heirs of their mother, who, in her lifetime, was the grantee in a deed of conveyance of said land executed to her by her husband, the defendant, he specially denied the title of the plaintiffs, although he admitted the execution of the deed.
Held, that the plaintiffs were entitled to open and close. *Thompson v. Mills et al.*.....528

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1. *Usury.*—A surety may set up the defence of usury. *Stockton et al. v. Coleman et al.*.....106
2. *Ratification.*—Where in a suit upon an official bond, the surety denied that he executed the bond, and there was evidence that he afterward assented to his name's remaining on the bond, the jury were authorized to find him liable on the bond for money received by his principal after such assent, and not paid over. *Hall v. The State, ex rel. Robinson et al.*..301

PROCEEDING SUPPLEMENTARY TO EXECUTION.

1. *Section 519 of the Code.*—The complaint in a proceeding supplementary to execution, under section 519 of the code, must state that the execution debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment. *Dandiset v. Kronenberger et al.*.....405
2. *Section 518 of the Code.*—*Execution Against Part Only of Judgment Defendants.*—If the language of section 518 would seem to contemplate the issuing of an execution against part only of the judgment defendants, it must be held to apply to cases where by statute for any cause such separate execution may issue. The execution should issue not only against the execution defendant, but also against the replevin bail, to authorize proceedings supplementary to execution.....*Ibid.*

PROCHEIN A.M.I.

- Consent.*—Where a complaint filed before a justice of the peace is signed by one as next friend of the plaintiff, it is a sufficient consent in writing under section 11, 2 G. & H. 42. *Rox v. Arnold*.....24

PROMISSORY NOTE.

See ESTOPPEL, 4, 5; *PLEADING*, 23; *PRACTICE*, 19.

1. *Indorser.*—*Jurisdiction.*—The makers of a promissory note, payable at a bank in this State, to a complaint against the makers and indorser, answered, that they were the parties immediately liable to judgment and execution, and that they resided out of the county in which the suit was brought;

Held, on motion by the plaintiff for judgment on the pleadings, that the answer was bad, as the indorser, as well as the makers, was immediately liable to the holder. *Hall et al. v. Swift*.....316

2. *Indorser.*—*Evidence.*—Where one not a party to a note places his name on the back thereof, before, or concurrently with, the indorsement by the payee, he is liable as indorser, but his actual relation to the maker and payee, as between themselves, may be shown by parol evidence, though not so as to affect the rights of the holder. *Houston v. Bruner et al.*.....376

3. *Issue Between Parties to Promissory Note.*—*Practice.*—*New Trial.*—The rights of parties liable on a promissory note may be settled, as between themselves, in an action against them by the holder of the note, and a new trial may be granted upon this issue; but the plaintiff in the action on the note will not be delayed thereby, but may proceed to collect his judgment against the parties liable to him. *Ibid.*

4. *Practice.*—*No Error to Sustain Demurrer to Paragraph where Facts are Admissible under Other Paragraphs.*—Suit against the maker of a promissory note negotiable by the law merchant, and indorsed by the payee to the plaintiffs. Answer, first, the general denial; second, that defendant made the note for the accom-

modation of the payee, who indorsed the same to G. & Bro.; that G. & Bro. are the legal and equitable owners thereof, and the plaintiffs had not, at the commencement of the suit, and have not now, any legal or equitable interest therein; sixth, that said note was made and delivered by the defendant to the plaintiffs by the hands of one M., their authorized agent, in renewal of a certain note of the defendant, payable to G. & Bro., which note was pledged by G. & Bro. to the plaintiffs, as collateral security for a debt; that after said note sued on was so delivered to plaintiffs, the defendant, by and through said agent, M., agreed with said plaintiffs that the said defendant would procure one S. to become an indorser on said note, and to pledge certain collateral security to secure such indorsement, on condition that the defendant should be released from any liability as maker on said note, and that said S. should be held as maker thereof; that defendant performed his agreement, and plaintiffs collected a large sum on said collaterals, the amount being unknown to defendant; that defendant has fully paid and satisfied said S. the sum of money mentioned in said note, and that a suit is now pending in the United States court in this district, wherein the plaintiffs are seeking to enforce said note against said S. A reply was filed to the second and sixth paragraphs. The defendant further answered in a fifth paragraph, that the defendant had some arrangement with M., the first holder of the note in suit after its blank indorsement by S., that the defendant was not to be held liable as maker; and that M. was acting as the agent of the plaintiffs. A demurrer to this fifth paragraph was sustained.

Held, that all evidence admissible under this paragraph might have been given under the second and sixth paragraphs of the answer, and the sustaining of the demurrer did no injury. *Mitchel v. Noell et al...* 399

5. *Contemporaneous Agreement in Conflict with Terms of Note.*—A third paragraph of answer was filed, setting up an agreement contemporaneous with the making and indorsement of the note, by which the mak-

er was not to be held liable. A fourth paragraph stated a like agreement with M., to whom it first passed by the indorsement of S., but charged no notice to the plaintiffs. A demurrer was sustained to each paragraph.

Held, that the ruling was correct... *Ibid.*

6. *Set-Off.—Mutuality.—Assignment.* In an action by the assignee of a note, not payable in bank, the defendant may set off a joint note made by the payee of the note sued on, as principal, for his individual debt, and by another as his surety, and held by the defendant as assignee thereof before notice of the assignment of the note sued on. *Hoffman et al. v. Zollinger.....* 461

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RAILROAD.

See CORPORATION, I to 4.

1. *Injury to Animals.—Two Railroads.* *Pleading.*—The Cincinnati and Martinsville R. R. Co. v. Paskins, 36 Ind. 380, adhered to. *The C. & M. R. R. Co. et al. v. Townsend.....* 38
2. *Aid by Counties to Railroad Companies.*—Under the act of May 12th, 1869, "to authorize aid to the construction of railroads by counties," etc., it is not legal for the board of commissioners of a county to submit to the voters of the county a proposition to vote for or against an appropriation to two or more railroad companies at the same time, when the proposition is so submitted that the voters cannot vote for one and against the other, but must vote for both or against both. *Garrigus et al. v. The Board of Comm'rs of Parke County.* 66
3. *Same.*—The rights and powers conferred by said statute can only be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the act..... *Ibid.*
4. *Killing Cattle.—Statute.—Negligence.*—In an action against a railroad company for the killing of cattle by the cars, where the suit is founded on the statute, and the liability of the company is based solely on a failure to fence the track, the question of contributory negligence does not

- arise; and if cattle have been killed or injured at a point on the railway where the company could lawfully fence the track, and it was not fenced, the company is liable. *The T., W., & W. R. W. Co. v. Cory*.....218
5. *Same*.—In such action, the question, whether the railroad company has securely fenced the track, is a question of fact, to be determined by the jury *Ibid.*
6. *Appropriation of Real Estate*.—*Appraisers*.—*Qualification of Jurors*. The first appraisers appointed under section 15 of the railroad act (1 G. & H. 509, 510) must be freeholders; and if the court, upon exceptions, order a new appraisement, the appraisers must possess the same qualification; but if either of the parties excepting to the first appraisement insists upon a jury trial, the jurors need only be reputable householders. It is otherwise, if the proceedings are under the act relating to the writ for the assessment of damages. *The L., N. A., & St. L. Air Line R. W. Co. v. Dryden*.....393
7. *Street Railroad*.—*Contributions*.—*Damages*.—Where contributions are made to secure the building of a street railroad, and the regular running of cars thereon a specified number of daily trips, the company receiving such contributions may stipulate that the damages for a failure to comply with these conditions shall be the sum contributed and interest thereon from the date of failure. *Crown Hill R. W. Co. v. Armstrong*....418
8. *Same*.—*Contract*.—*Mutuality*.—*Consideration*.—*Signing*.—Such a stipulation, it was held, was not void for want of mutuality, or of consideration, though not signed by the party making the subscription, the obligation on his part being evidenced by his promissory note, previously executed, which was paid by him upon the execution by the company of the instrument containing said stipulation, the company having verbally agreed, at the time of the execution of said note, that the maker, who was interested in the maintenance of the road, should have some security for its permanent working, and the instrument containing said stipulation purporting to be made in consummation of said verbal agreement...*Ibid.*
9. *Tickets*.—*Damages*.—A passenger on a railroad train gave to the conductor his ticket from C. to N., but the conductor gave him no check in return; before reaching N., there was a change of conductors, and the new conductor expelled the passenger for want of a ticket or check. Held, that the railroad company was liable in damages to the passenger, and that the Supreme Court could not disturb a verdict for five hundred dollars, in such a case, on the ground that the damages were excessive. *The P., C., & St. L. R. W. Co. v. Hennigh*509
10. *Appropriation to by County*.—*Time. Good Faith*.—The eighteenth section of the act, entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," 3 Ind. Stat. 389, requires the railroad company to which an appropriation has been made by a county to commence work upon the railroad in such county, in good faith, within one year from the time of the levy of the tax therefor, unless time has been given. *The State, ex rel. Scobey, v. Wheadon, Aud*....520
11. *Same*.—*Tax*.—When the railroad company fails to commence work in good faith upon the railroad within one year from the levy of the tax, the tax-payer is discharged from his obligation to pay the tax, and no proceeding will lie to require the auditor to place the tax upon the duplicate or take any other steps to collect the same.....*Ibid.*
12. *Same*.—*Board of Commissioners*.—The board of commissioners can levy a tax in aid of the construction of a railroad at their June session only...*Ibid.*
13. *Same*.—*Time of Levy*.—The tax is levied when the board of commissioners orders that the tax specified be levied, and not when the tax thus levied is placed upon the tax duplicate by the auditor.....*Ibid.*
14. *Same*.—The time within which the railroad company must commence work upon the railroad in the county, in order to avail itself of an appropriation by the county, commences from the time when the order levying the tax is made by the board of county commissioners, and not from the time when the levy is placed on

- the tax duplicate.....*Ibid.*
15. *Same.*—“*Commencing Work.*”—*Right of Way.—Letting Contract.*—By acquiring the right of way or letting contracts for the construction of a railroad, a railroad company does not “commence work upon the railroad.”*Ibid.*
16. *Same.*—*Constitutional Law.*—*BUSKIRK, C. J., concurring,* held, further, that the aid to be furnished to incorporated companies by counties is limited to the taking of stock, by section 6, article 10, of the constitution of the State.....*Ibid.*
17. *Same.*—*Election.—Board of Commissioners.*—*DOWNEY, J., concurring,* held further, that under the statute authorizing aid to the construction of railroads, the question whether a county shall aid in the construction of a railroad by donation of money or by taking stock of the railroad company, cannot be submitted to the election of the voters, but is for the board of county commissioners only to decide, after the money has been collected by taxation.....*Ibid.*
18. *Appropriation to.—Petition.—Notice.—Injunction.*—Under “an act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies,” 3 Ind. Stat. 389, the petition to the board of county commissioners, and the notice of election issued by the auditor, must specify the amount to be appropriated, and not a per centum upon the taxable property; and, where the petition does not specify the amount, but asks a certain per centum upon the taxable property of the county to be appropriated, the action of the board of commissioners, and the proceedings thereunder, to levy a tax, are void, and may be enjoined, at the suit of the tax-payer of the county; and an appeal from the action of the board is unnecessary. *The C., W., & M. R. R. Co. et al. v. Wells et al.*.....539
19. *Injury to Person—Negligence.—Proximate Cause.*—In an action against a railroad company for damages for an injury to a person, resulting in death, caused by the negligence of the servants of said company, where the instructions given by the court required the jury to find wheth- er or not the death of the deceased was caused by the act of defendant; *Held*, that it was not error for the court to refuse to instruct that they should find whether or not the act of defendant was the proximate cause of the death of defendant. *The J., M., & I. R. R. Co. v. Riley, Adm'x*.....568
20. *Same.*—In such an action, it is not error in the court to refuse to instruct the jury that the injury complained of cannot be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him, producing his death, would not have produced the death of a well person. *Ibid.*
21. *Same.—Passenger.*—It is not necessary that a person should be on the train of a railroad in order to be regarded as a passenger. As a passenger, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street along-side of the track and platforms; and the servants of the railroad company are bound to exercise the care of a reasonable and prudent man in the discharge of their duties on said platforms and street, and have no right to throw sticks of wood from the train upon such platforms or street, without first ascertaining whether such action would endanger any passenger standing or walking there. *Ibid.*
22. *Same.—Degrees of Care.*—A railroad company owes a higher degree of care and watchfulness to its passengers than to mere strangers...*Ibid.*
23. *Same.—Damages.*—Damages in the sum of two thousand three hundred and thirty-three dollars and thirty-five cents were held not to be excessive in this case for an injury to a person resulting in death*Ibid.*
24. *Appropriation to.—Petition.—Notice.*—A petition to the board of commissioners of a county to make an appropriation of money, by levying a special tax, to aid in the construction of a railroad, and the notices of election on the subject of the proposed appropriation, must specify the amount of money to be appropriated. *The D., E. R., & I. R. R. Co. et al. v. Bearss et al.*.....598

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25. *Same.—Per Centum of Taxables.* A certain per cent. on the taxable property of the county is not a specific amount. WORDEN, J., dissented. *Ibid.*
26. *Same.—Time of Levy.*—The statute (3 Ind. Stat. 389) providing that the board of commissioners shall levy a special tax to aid in the construction of a railroad, at their regular June session is mandatory, and a levy at any other time is void.....*Ibid.*
27. *Same.—Forfeiture.*—Said statute provides that "a failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax," etc., "shall forfeit the rights of such company to such donation." *Held*, that the railroad company must commence work in good faith, with the honest purpose of constructing the road within a reasonable time, taking into consideration the extent and character of the work to be done; and, that to do work manifestly to evade forfeiture, is not "to commence work" within the meaning of the statute.....*Ibid.*
28. *Same.—Election.—Registry Law.* *Repeal of Statute.*—Where the statute under which an election was held provided, that the last preceding registry of voters should govern, and prior to the day of election the law requiring a registry was repealed; *Held*, said election being held without regard to said registry, that it was a valid election.....*Ibid.*
29. *Same.—Ballot.*—Where the statute prescribed that the ballots used in voting upon the question of an appropriation by a county or township, to aid in the construction of a railroad, should contain the words, "for the railroad appropriation;" and, at the election, a large portion of the ballots cast and counted contained only the words "for the railroad;" *Held*, that the casting and counting of such ballots constituted an irregularity which would not affect the validity of the election.....*Ibid.*
30. *Same.—Notice.—Evidence.—Sheriff's Return.*—The certificate of the sheriff that he has posted notices of election in ten public places in the township, is not defective for not specifying the places, and such cer-

tificate is *prima facie* evidence that notices have been posted in ten public places in said township. If, in fact, notices of an election be not posted in ten public places, as prescribed by the statute, the election will be invalid.....*Ibid.*

REAL PROPERTY, RECOVERY OF.

See NEW TRIAL, 14 to 19.

RECEIVER.

See INSURANCE, 1, 2.

RECOGNIZANCE.

Suit on.—Criminal Courts.—An action cannot be commenced against the bail upon a forfeited recognizance, until after the adjournment of the term of court at which the forfeiture occurred; and this rule applies to criminal courts, that hold but two terms in each year. *Glass et al. v. The State*.....205

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Summons.—The summons and the return of service thereof should, without any order of court, or bill of exceptions, be part of the record, in cases tried on default of appearance. *Barnes v. Roemer et al.*.....589

REPLEVIN.

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1. *Practice. — Dismissal of Action.* *Judgment.*—Where the plaintiff in an action of replevin dismisses such action before a finding is announced by the court or a verdict is returned by the jury, there can be no judgment for the return of the property.

- DOWNEY, J., dissented. *Wiseman et al. v. Lynn*.....250
2. *Bond.—Failure to Prosecute.—Liability of Sureties.*—Such dismissal of the action will render the sureties on the replevin bond liable for a failure of their principal to prosecute the action with effect.....*Ibid.*
3. *Same. — Pleading. — Answer of Property in Plaintiff.*—An answer to an action on the bond, of property in the plaintiff in the action of replevin, constitutes no defence to the action, but the fact goes in mitigation of damages.....*Ibid.*
4. *Same.—Recital of Value.*—The recital, in a replevin bond, of the value of the property is sufficient evidence of the value, in an action on the bond, and estops the plaintiff and his sureties from denying the same. *Ibid.*

RES ADJUDICATA.

See PLEADING, 5 to 7.

RESCISSION.

See CONTRACT, 2, 7; FRAUD, 3, 6.

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SALE.

See FRAUD, 1, 2, 3; STATUTE OF FRAUDS, 1, 2; WARRANTY.

SCHOOLS.

See TAX, I.

SET-OFF.

See PROMISSORY NOTE, 6.

SOLDIERS.

1. *Board of County Commissioners. Aid to Soldiers' Families.—Appeal.* A., in March, 1869, filed her petition before the Board of Commissioners of Monroe County, alleging that she was the widow of a soldier who had served in the army of the United States from August, 1862, until the 26th day of June, 1865, when he was honorably discharged by reason of disability contracted in the service; that while in the service, he had a wife, the petitioner, and

three children under twelve years of age; and that she was entitled to have and receive twelve months' pay at the rate of fourteen dollars per month, out of the fund collected in said county on the levy made under the act of March 4th, 1865, for the relief of families of soldiers, seamen, etc. The board of commissioners disallowed the claim, and the petitioner appealed to the court of common pleas, and by that court the appeal was dismissed.

Held, that as the later act of December 20th, 1865, in terms repealed the act of March 4th, 1865, and provided further, that all disbursements of the funds raised under the act repealed should cease on and after the 3d day of March, 1866, and as the claim of the petitioner was one to obtain a sum claimed to be due under the act of March, 1865, as modified by that of December, 1865, and as the claim was not made until long after the 3d of March, 1866, when disbursements were to cease, it was wholly within the discretion of the board of commissioners to allow it or not, and no appeal lay to any other court from the action of the board. *Sims v. The Board of Commissioners of Monroe County*.....40

2. *Same.—Case Overruled.*—Under the provisions of said act of December, 1865, none of the persons enumerated in the repealed act can claim, as a matter of right, any portion of the fund, since the 3d day of March, 1866. *Board of Commissioners of Clinton County v. McDowell*, 30 Ind. 87, overruled.....*Ibid.*
3. *Appeal.—Board of Commissioners.* There is no statute which authorizes an appeal from the action of the board of commissioners upon a matter involving no question of legal right, but simply a matter for the exercise of the discretion of the board. *Ibid.*

4. *Soldier's Widow.—Relief.*—Since the 3d of March, 1866, widows of soldiers who died of disease contracted in the military service of the United States, cannot, under the statute of March 4th, 1865, as a matter of right, enforce any claim against a county on account of said services. *Board of Commissioners of Jackson County v. Elliott*.....191

5. *Bounty.—Legalizing Act.*—The act of March 3d, 1865, to legalize county bonds and orders to pay volunteers' bounties, related back to the time the bonds and orders were issued, and made them valid as though the county boards had then possessed the power to issue them. *The State, ex rel. Fullheart, v. Buckles, Auditor*...272
6. *Bounty.*—An order was passed by the board of commissioners of Monroe County, that they "agree and do give to each volunteer from Monroe county, under the present call for," etc., a certain sum to be paid in cash or county orders, "upon the full quota being made up and mustered into the service of the United States." This order was amended, "so that each man volunteering, and being legally mustered into the service of the United States shall be entitled to and receive a warrant on the treasury of Monroe county for one hundred dollars; said warrant to be issued whenever satisfactory proof is made to the auditor that said volunteer has been duly mustered into the service of the United States."
- Held*, that the first order entitled the volunteer who complied with the order to the bounty, upon the full quota of the county being made up. The amended order did not take away the right to the bounty given in the original order, but left out the condition as to making up the quota in full. It authorized the auditor to issue the warrant on satisfactory proof made before him; but this did not make the furnishing of such proof to the auditor a condition precedent to the right of the volunteer to receive the bounty, or to his right of action to recover it.
- Held*, also, that where a citizen of Monroe county volunteered while these orders were in force, and was mustered into service and credited to Monroe county, the right to the bounty was made out. *Board of Commissioners of Monroe County v. Wood*.....345
7. *Same. — Repeal of Order.*—On March 11th, 1864, these orders were repealed, and it was "directed that no order or warrant be issued to any person who shall volunteer in the service of the United States, or who shall

be mustered into said service after this date."

Held, that the repealing order could not defeat any right acquired by a volunteer under the repealed orders prior to the date of the repeal.....*Ibid.*

SPECIAL FINDING.

See PRACTICE, 5, 6, 22.

SPECIFIC PERFORMANCE.

See CONTRACT, 5, 6.

STAMP.

Evidence.—An objection to the introduction in evidence of a written contract, on the ground that the United States revenue stamp required by law affixed thereto was cancelled only with the initials of the party signing the contract, without the date, was properly overruled. *Doffin v. Guyer*.

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STATUTE.

See BANKS AND BANKING, 8, 9.

1. *Construction.—Rule of.*—The rule of construction, that "words importing the singular number only, may also be applied to the plural of persons and things" (sec. 798 of the code), is only to be applied to the words of a statute or instrument when the plain and evident sense and meaning of the words, to be derived from the context, render such a construction necessary to give effect to the intention of the maker of the statute or instrument. *Garrigus et al. v. The Bd of Comm'rs of Parke County*.....66
2. *Same.—Title of Act.*—The title of a statute may be a guide to the intention of the law-makers, where the statute appears to be ambiguous or doubtful.....*Ibid.*
3. *Repugnant Provisions.*—Where two statutes are clearly repugnant to each other in their provisions, the later must be regarded as having superseded the former. *City of Evansville et al. v. Bayard*.....450

STATUTE OF FRAUDS.

See CONTRACT, 5.

1. *Auction Sale*.—A sale at public auction is within the statute of frauds.
Norris v. Blair, Adm'r.....90
2. *Same*.—*Memorandum of Clerk of Sale*.—Where a sale was made at public auction, upon a credit, and a note was to be given with security, waiving valuation and appraisement laws, a memorandum of the sale made by the clerk thereof, which did not state these facts, was insufficient to avoid the effect of the statute.
Ibid.

STATUTE OF LIMITATIONS.

See JUDGMENT, I.

STREET RAILWAY.

See RAILROAD, 7, 8.

STRIKING OUT.

See PLEADING, I.

SUBROGATION.

Promissory Note and Mortgage.—Assignment and Additional Mortgage. B. executed to H. certain promissory notes and a mortgage to secure their payment; H. afterward purchased lands of T., and in part payment transferred the notes and mortgage of B., and with his wife executed a mortgage on the land purchased to secure the payment of these notes, and stipulated to pay them; T. transferred the notes and mortgage to E., who foreclosed the mortgage executed by B., and took personal judgment against him on the notes; W. became bail for the stay of execution on the judgment, and was compelled to pay the same, and received a transfer from E. of any interest he held in the mortgage executed by H. and wife. Suit by W. asking to be subrogated to the rights of E. in this mortgage, B. being insolvent.

Held, that there was no equity in the case made, and a demurrer to the complaint setting up these facts was properly sustained. *Barlow v. Deibert et al.*.....16

SUMMONS.

See RECORD.

SUPREME COURT.

See ATTORNEY, 5; BILL OF EXCEPTIONS; COSTS, 3; CRIMINAL LAW, 13; DIVORCE; NEW TRIAL, 11, 20, 21; PRACTICE, 12, 13, 14, 18, 19, 23, 24.

Assignment of error. *See CITY OF WASHINGTON v. KAUFFMAN, 143.*

Transcript, authentication by seal. *See HIATT v. PETTJOHN, 246.*

Transcript, contents of. *See KEMP v. WILLSON, 456.*

1. *Costs*.—Where no question is made in the court below in reference to costs, it cannot be successfully raised for the first time in the Supreme Court. *Beynon v. The Brandywine, etc., Turnpike Co.*.....129
2. *Jurisdiction.—Divorce.—Allowance to Wife*.—On an appeal from a judgment in a proceeding for a divorce, the Supreme Court cannot, on the application of the wife, originally made to that court, order an allowance to the wife, to be paid by the husband, for her support and the support of her children during the pendency of the appeal. *Kesler v. Kesler*.
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3. *Assignment of Error*.—Where a complaint asked for the appointment of a receiver, and the court found that a receiver should be appointed, but no receiver was in fact appointed;

Held, that the failure of the court to appoint a receiver could not be assigned as error by the defendant, when he did not ask for such appointment, but opposed it. *Emmons v. Keller*.178

4. *Same*.—An assignment that the court erred in excluding the evidence of a certain witness raises no question, where there is no general assignment that the court erred in overruling a motion for a new trial, and there is an assignment of error in refusing to grant a new trial placed on other specific grounds only; although the exclusion of the evidence was mentioned in the motion as a reason for a new trial. *Temp!e et al. v. Lasher*203
5. *Evidence*.—Where the finding is not clearly wrong, upon the evidence, although it may not be clearly right,

- this court will not, upon the evidence, disturb the judgment. *Atkisson v. Martin et al.*.....242
6. *Notice of Appeal.*—Where, upon an appeal to the Supreme Court from a joint judgment, any of the judgment defendants do not join in the appeal, and notice of the appeal is not given them, as required by section 551, 2 G. & H. 270, the appeal will be dismissed. *Reynolds et al. v. Town of Monticello*.....241
Spellman v. The First National Bank of Shelbyville.....244
McGoldrick et al. v. Slevin et al...364
Harlan v. Watson et al......393
Winship v. Winship et al......460
Koerner et al. v. Baldwin.....474
7. *Waiver of Objections.*—This court declined to consider any question as to the right of a temporary judge to hold a court, where all objections thereto were waived of record by the parties. *Bouslog v. Garrett*.....338
8. *Parties.*—*Guardian ad Litem.*—A guardian *ad litem* cannot appeal to the Supreme Court in his own name. *Harlan v. Watson et al.*.....393
9. *Preponderance of Evidence.*—The court below having seen the witnesses face to face, heard their evidence, perhaps knowing their characters for truth and veracity, and having seen and observed their willingness and readiness, or reluctance and hesitancy, in answering questions, the Supreme Court will not reverse its action in overruling a motion for a new trial on the question of the weight of evidence, there being evidence tending to support the finding of the jury. *Hunt, Adm'r, v. Price*.....408
10. *Rehearing.*—A rehearing will not be granted by the Supreme Court in order to enable a party to have the record amended. *Warner et al. v. Campbell et al.*.....409
11. *New Trial.*—*Assignment of Error.*—The reasons embraced within the statutory cases in which a new trial may be granted must be assigned as reasons for a new trial in the court below, and are not properly assignable as error in the Supreme Court. *Leach et al. v. Prebster et al.*.....492
12. *Same.*—The assignment as error of the action of the court below upon a motion for a new trial renders it unnecessary to assign as error any of the reasons properly embraced in the motion for a new trial*Ibid.*
13. *Same.*—Errors of law occurring prior to the commencement of the trial need not be assigned as reasons for a new trial, but must be assigned as error in the Supreme Court..*Ibid.*
14. *Same.*—Errors of law occurring during the progress of the trial must be assigned as reasons for a new trial in the court below, to entitle them to review in the Supreme Court....*Ibid.*
15. *Assignment of Error.*—*Evidence.* An objection to a ruling admitting or rejecting evidence cannot be raised by an assignment of error in the Supreme Court, where it has not been embraced as a reason in a motion for a new trial below. *Sharpe v. O'Brien et al.*.....501
16. *Record.*—*Agreement.*—As a general rule, counsel cannot, by agreeing to a change of the record on appeal, present to the Supreme Court a question different from that which appears by the record to have been decided in the court below. *Whitman, Receiver, v. Weller*.....515
17. *Constitutional Law.*—Unless waived by a party, the Supreme Court is required to give a statement in writing of each question arising in the record of a case, and the decision of the court thereon, as provided in section 5, article 7, of the constitution of the State (1 G. & H. 46). A question arises in the record when it is fully and clearly stated in the transcript, and is embraced in an assignment of error, and the decision thereof is necessary to the final determination of the cause. *Trayser et al. v. The Trustees of Ind. Asbury University et al.*.....556
18. *Assignment of Error.*—*Waiver of.* An assignment of error may be waived by an entry on the record, or by express waiver in a brief or oral argument, or by a concession incompatible with the error assigned; but the mere failure of counsel to argue a question "arising in the record," cannot be regarded as a waiver of the error.....*Ibid.*
19. *Evidence.* — *Presumption.* — The evidence not being in the record on appeal, the Supreme Court will presume it supported the finding and judgment of the court below. *Barnes*

- v. Roemer et al.....589
 20. *Judgment too Large.*—Where the judgment is for too large a sum, the application must be made first to the court below to correct it, or the Supreme Court will not examine the question.....*Ibid.*
 21. *Parties.—Personal Representative. Heir.*—Where both a personal judgment and a decree of foreclosure of a mortgage have been rendered in an action, and the judgment defendant has afterward died, upon an appeal from such judgment to the Supreme Court, the personal representative and the heir should unite as appellants. *Benoit, Adm'r, v. Schneider, Adm'r*.....591
 22. *Same. — Trustee. — Successor in Trust.*—If the deceased held the mortgaged land as trustee, and some one else has succeeded to the estate as succeeding trustee, that person should be a party to the appeal as the representative of the ownership of the real estate.....*Ibid.*
 23. *Same.—Refusal to Join.—Query.* If, where both the personal representative and the heir ought to join in the appeal, either should decline, *query* whether notice may not be given to the party refusing to join, under section 551, p. 270, 2 G. & H. *Ibid.*
 24. *Evidence. —* The Supreme Court will not weigh the evidence given on the trial below, in order to determine the preponderance. *Shafer v. Bronenburg et al.*.....595

T**TAX.**

See BANKS AND BANKING, 8, 9; CITY, 5 to 8; FEES AND SALARIES, 2; RAILROAD, 10 to 17, 24 to 30; TURNPIKE, 8, 9.

1. *Special School Tax.—National Bank Stock.*—Shares of stock in a national bank are liable to a special school tax. *Daniels, Treasurer, v. Strader et al.*.....63
 2. *Payment After Suit.*—The payment of taxes, after the commencement of an action to replevy personal property seized by the treasurer for such taxes, cannot be given in evidence to sustain the action. *Busby*

- v. Noland et al.....234
 3. *Same.—Estoppel.*—Such payment of taxes, without protest, after the bringing of the action of replevin, estops the plaintiff from denying that the taxes are legal.....*Ibid.*

TENANT IN COMMON.

Conveyance.—One tenant in common, owning an undivided interest in real estate, cannot convey to a stranger a certain portion of the tract held in common, and put the purchaser in possession of the portion conveyed. *Mattox v. Hightshue*.....95

TORT.

See WARRANTY, 1, 2.

TREASURER OF STATE.

See PLEADING, 22.

TRIAL.

See CRIMINAL LAW, 1, 2.

TRUST AND TRUSTEE.

See SUPREME COURT, 22.

TURNPIKE.

See PLEADING, 9.

1. *Proceedings to Condemn Lands.—Justice of the Peace.—Appeal.*—In proceedings commenced before a justice of the peace, to condemn lands for the right of way of a turnpike, though the record does not show which party appealed to the circuit court, or that any appeal was taken, yet, if a transcript of the proceedings before the justice and the papers in the case were filed in the circuit court, and the parties appeared therein and proceeded as if an appeal had been taken, the cause may be regarded as having been regularly appealed, or any error in that respect may be considered waived. *Beynon v. The Brandywine, etc., Turnpike Co.*...129
 2. *Same.—Departure from Route.*—In the absence of proof showing that the line of a road, for which lands are sought to be condemned, is a departure from the line contemplated

- by the articles of association of the turnpike company that instituted the proceedings, it is not error to overrule a motion to dismiss the proceedings on the grounds of such departure.
- Query*, whether such objection can be taken by motion.....*Ibid.*
3. *Same*.—Where a complaint by a turnpike company, to condemn lands for her road, states that the road has been located, the question of location cannot be tried on a motion to dismiss because the road has not been located.....*Ibid.*
4. *Same*.—*Viewers*.—Under the statute (1 G. & H. 475, sec. 7), in a proceeding before a justice to condemn lands for the use of a road, as well as on appeal, three viewers are to be appointed, who are to be sworn as jurors to assess the damages*Ibid.*
5. *Same*.—*Trial by Jury*.—Where three viewers were in such a case appointed by the justice, without any objection from the owner of the land sought to be condemned, and on appeal to the circuit court, three other viewers were appointed, the owner only making a general objection to the appointment of viewers, and not claiming a jury of twelve;
Held, that the right of trial by a jury of twelve was waived, even if the owner otherwise had that right; and that after the coming in of a report by viewers appointed by the court on appeal, it was too late to demand a jury*Ibid.*
6. *Same*.—*Report of Viewers*.—A report made by a majority of the viewers appointed to assess damages for lands sought to be condemned is sufficient.....*Ibid.*
7. *Same*.—*Motion to Set Aside Report of Viewers*.—A motion to set aside a report of viewers in such case, on the grounds that they have deducted supposed benefits and failed to consider important injuries, where no proof is offered in support thereof, is rightly overruled
8. *Assessment*.—*Presumption of Law*. Where a tax is assessed for the purpose of constructing a turnpike, it will be presumed, the contrary not appearing, that the county auditor only made out the duplicate for the amount of tax that was properly collectible. *Hazzard et al. v. Heacock*.....172
9. *Same*.—*Distress*.—A tax assessed for the purpose of constructing a turnpike may be collected by distress and sale of personal property....*Ibid.*
10. *List of Lands*.—When assessors, appointed under the act of March 11th, 1867, to assess lands to aid in the construction of a turnpike, fail to include in the list, which they are required to make and return, all the lands within one mile and a half of the line and each terminus of the turnpike, an injunction will lie to prevent the collection of the assessment. *Scott v. The Mt. Auburn, etc., Company et al.*.....271
11. *County Commissioners*.—*Appeal*. No appeal lies from the decision of a board of county commissioners upon an application of a turnpike company for leave to construct its road along a public highway. *Dudley et al. v. The Blountsville, etc., Co.*.....288
12. *Completed Road*.—*Assessment*.—The fact that a gravel road had been completed, except one-fourth of a mile, prior to the act of May 14th, 1869 (Acts 1869, Spec. Sess. 73), is not a sufficient reason for enjoining the collection of an assessment to complete the same. That act, as well as the act on the same subject approved March 11th, 1867, was intended for the relief of roads which had been partly constructed before its passage, as well as for those which should be wholly constructed after its passage. *The Fall Creek, etc., Gravel Road Co. et al. v. Wallace et al.*.....435
13. *Subscribers*.—*Assessment*.—Where a portion of the persons assessed have subscribed and paid toward the construction of a gravel road, they are entitled to credits on their assessments, as the same fall due, equal to the amounts so paid, and are not required to pay their assessments until other persons assessed, not subscribers, have paid as much, in proportion, on their assessments, as such subscribers have paid on their subscriptions.....*Ibid.*

U

USURY.

See INTEREST, 1, 2; PRINCIPAL AND SURETY, 1.

V

VARIANCE.

See MORTGAGE, 3, 4.

VENDOR AND PURCHASER.

See CITY, 2; HUSBAND AND WIFE, 1, 2, 3; LANDLORD AND TENANT, 1; TENANT IN COMMON.

1. *Contract to Remove Lien on Land.*
Parties.—Suit by A. against B. upon this instrument: “I obligate myself, in penalty of five hundred dollars, to remove the mortgage from the lot on Noble street, Indianapolis, this day conveyed to” A., “within three months from this date;” dated, and signed by B. The complaint alleged that the mortgage remained a lien upon the lot, to the amount of two hundred and sixty-six dollars, in favor of The Indianapolis and Cincinnati Railroad Company, although more than three months had passed.

Held, that the complaint was sufficient on demurrer, without an averment that the railroad company was attempting to enforce its lien, or that the plaintiff had paid the lien, or that he had been evicted; and also that the railroad company was not a necessary party. *Scobey v. Finton.*

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2. *Equitable Assignment of Judgment.*
Set-Off Against Insolvent Holder.
Parties. — Verification of Answer. The defendant answered, that at the bringing of the suit, he was the equitable owner of certain judgments against the Indianapolis and Cincinnati Railroad Company, which had not been assigned on the judgment docket, and asked that the plaintiffs in said judgments be made parties to answer as to their interest; he also alleged that said railroad was insolvent, and asked that it be made a party, and his said judgments set off against the mortgage debt. A demurrer was sustained to this answer.
Held, that this was error. The answer did not require verification.....*Ibid.*
3. *Vendor's Lien.—Estoppel.—Failure to Demur.*—A. sought to enforce a vendor's lien against land owned by D. A. sold the land, January, 1857,

to B.; B. sold it, June, 1857, to C.; C. sold it, December, 1865, to D. The suit was commenced in June, 1869. D. answered that the plaintiff was estopped from claiming his lien, because before he, D., purchased and paid for the land, he made inquiry of the plaintiff, whether it would be all right, and was advised by him to proceed with the purchase. Issue was taken on this by a denial.

Held, that the failure to demur waived the question as to the sufficiency of the facts stated to constitute an estoppel, and that on proof of the allegations the defendant was entitled to a verdict. *Atkinson et al. v. Lindsey.*

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VENUE.

Change of. *See CRIMINAL LAW, II; JUDGE, 2.*

VERDICT.

See PRACTICE, 19.

W

WAIVER.

See FRAUD, 6; SUPREME COURT, 7, 18.

WARRANTY.

See GARNISHMENT; INSURANCE, 5 to 8.

1. *Pleading.—Fraud.*—A transaction cannot be characterized as a warranty and a fraud at the same time. *Rose et al. v. Hurley*.....77
2. *Same.—Contract.—Tort.*—A warranty rests upon contract; while fraud or a fraudulent representation has no element of contract in it, but is essentially a tort.....*Ibid.*
3. *Parol Evidence.*—If a suit is founded on a warranty in the sale of a patent right, the contract of warranty must be in the deed by which the law requires these rights to be transferred; and if it does not so appear in the deed, it cannot be shown by parol.....*Ibid.*

WIDOW.

See WILL, 3, 4.

WILL.

I. Construction.—Election.—A. devised to B. one hundred acres of land, the will containing the following provisions: "for which there is to be a charge made against him of one thousand dollars, to be by him paid into my estate two years from the time of his arriving at the age of twenty-one years; if he should not elect to take the land, then and in that case, he is to have three thousand dollars in money, and is exempted from paying the one thousand dollars as above specified, and the real estate hereby bequeathed is to remain as the real property of my wife, subject to her disposal, and to be by her disposed of as by my will directed, with the residue of my real estate given her," etc. A. had no children, and B. was of no kin to decedent, but was taken by him when he was a babe, to be raised, but was not adopted, and was named by the deceased after himself, and was eight years old at decedent's death.

Held, that looking at the whole will, and regarding the circumstances surrounding the testator, it was his intention to give B. a present estate in the land devised, subject to the payment of the one thousand dollars in two years after his majority. But if he should elect not to take the land and pay the one thousand dollars, in that case he was to be paid the three thousand dollars.

Held, also, that it was evidently the intention of the testator that B. should have the land, and it required an election on his part to reject the land and claim the pecuniary provision, before he would be entitled thereto. *Ridgway et al. v. Manifold, Guardian*..... 58

2. Evidence.—Insanity.—Witnesses, other than medical experts, are competent to give an opinion, from the facts testified of by them, as to the sanity or insanity of a testator at the time of the execution of his will. *Leach et al. v. Prebster et al.*..... 492

3. Widow.—Election.—In the absence of an avowed election by the widow, with full knowledge of the provisions of the will, no time for such election being fixed by the statute, the widow

will be entitled to take under the statute..... *Ibid.*

4. Same.—Where a will is adjudged void for want of mental capacity in the testator, it is void as to the widow who may have elected to take under the will..... *Ibid.*

5. Witness.—Husband and Wife.—Evidence.—On the trial of a suit by husband and wife to contest a will, the latter being an heir at law of the testator, she is a competent witness to testify in her own behalf. *Call v. Byram et al.*..... 499

6. Subscribing Witnesses.—The subscribing witnesses to a will are competent witnesses, on the trial of an action to set aside the will, to give their opinions as to the soundness of mind of the testator..... *Ibid.*

WITNESS.

See Costs, 3, 4; WILL, 2, 5, 6.

1. Statute.—Heirs.—Under the second proviso in the act of March 11th, 1867, 3 Ind. Stat. 559, "defining who shall be competent witnesses," etc., the word "heirs" includes all persons who take any portion of the estate under the statute of descents, or who would have thus taken, did they not take by virtue of a will. A widow taking by will is an heir. *Peacock et ux. v. Albin*..... 25

2. Same.—Chose in Action.—The words "other property," in the proviso, do not apply to an action brought upon evidences of debt or things in action, which belonged to an ancestor and descended under the statute to an heir, or were bequeathed by a will to a person who would have inherited under the statute..... *Ibid.*

3. Same.—Assignment of Claims.—Under the first proviso of said act regarding witnesses, the assignment of uncollected claims, when made in the mode prescribed for assigning such claims to heirs or legatees, does not restore the competency of witnesses, who would have been incompetent if the action had been brought by an administrator or executor. *Ibid.*

4. Note Assigned by Administrator.—In an action by an assignee of the administratrix of an estate, on a promissory note executed to the decedent, and assigned under the statute

- to the plaintiff as an heir, the maker of the note is not a competent witness to prove payment of the note to the decedent. *Fitzgerald v. Cox et al.* 84
5. *Administrator*.—Where suit was brought on an official bond against the principal, and a surety, and the administrator of a deceased surety, and the process was returned, as to the administrator, "not found," and no steps were taken to have the cause continued as to such administrator for further process, and the plaintiff proceeded to trial as to the other defendants, the suit abated as to the administrator, and he was not afterward a party, if he was so before, and the plaintiff could testify as a witness in his own behalf. *Hall v. The State, ex rel. Robinson et al.*.....301
6. *Heirs*.—In an action for partition, where the petitioners claimed title to land by descent, as heirs of their mother, who, in her lifetime, was the grantee of a deed for said land, executed directly to her by her husband, and said husband, as defendant, in answer to the petition for partition, specially denied any title in the petitioners as derived from said deed; *Held*, that the action was both by and against heirs, and founded on the deed, within the meaning of the statute (3 Ind. Stat. 560, sec. 2) declaring parties incompetent as witnesses "in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way." *Thompson v. Mills et al.*.....528
7. *Statute*.—The conviction of a person of a felony, which by the Revised Statutes of 1843 rendered him incompetent to give evidence in a court, under the Revised Statutes of 1852 may be shown for the purpose of affecting his credibility. *The J., M., & I. R. R. Co. v. Riley, Adm'x*.....568

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(H. J. W.)

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